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No.

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In the Supreme Court of the United States

October Term, 1982

RICHARD G. SYMANOWICZ,
Petitioner,

vs.

ARMY AND AIR FORCE EXCHANGE SERVICE

and

EMPLOYERS INSURANCE OF WAUSAU

and

DIRECTOR, OFFICE OF WORKERS' COMPENSATION PROGRAMS, UNITED STATES DEPARTMENT OF LABOR,
Respondents.

PETITION FOR WRIT OF CERTIORARI
To the United States Court of Appeals
For the Seventh Circuit

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QUESTION PRESENTED

1. The Treaty of Mutual Cooperation and Security between the United States of America and Japan and Status of Forces Agreement should be given judicial notice in a workers' compensation claim where failure to do so creates an international conflict of law and results in an unjust decision to the claimant.

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No.

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OPINIONS BELOW

The unreported opinion of the Court of Appeals, rendered on March 16, 1982, is included in Appendix A. The decisions and orders of the Benefits Review Board, November 28, 1980, and the Administrative Law Judge, March 26, 1979, in the United States Department of Labor are also included as Appendix B and Appendix C, respectively.

JURISDICTION

The judgment of the United States Court of Appeals for the Seventh Circuit was entered on March 16, 1982. The order denying petitioner's timely Petition for Rehearing En Banc was entered on June 28, 1982. This Petition was filed within ninety days of that date.

The jurisdiction of this Court is invoked under 28 U.S.C. Section 1254 (1).

LAWS INVOLVED

Both United States and Japanese workers' compensation laws enter into the facts of this case; they are not an issue in this Petition. The only law at issue herein is that which governs treaties and the Treaty which is at issue:

Constitution of the United States of America, Article VI, Clause 2, Supreme Law:

> This Constitution, and the Laws of the United States which shall be made in Pursuance thereof; and all Treaties made, or which shall be made, under the Authority of the United States, shall be the supreme Law of the Land; and the Judges in every State shall be bound thereby, any thing in the Constitution or Laws of any State of the Contrary notwithstanding.

Treaty of Mutual Cooperation and Security Between the United States of America and Japan and Status of Forces Agreement signed January 19, 1960, 11 U.S.T. 1632:

(Full text *infra*, Appendix E.)

Agreement under Article VI of the Treaty of Mutual Cooperation and Security Between the United States of

America and Japan, regarding Facilities and Areas and the Status of the United States Armed Forces in Japan, January 19, 1960, 11 U.S.T. 1652, Article XVIII:

> 5. Claims (other than contractual claims and those to which paragraphs 6 or 7 of this Article apply) arising out of acts or omissions of members or employees of the United States armed forces done in the performance of official duty, or out of any other act, omission or occurrence for which the United States armed forces are legally responsible, and causing damage in Japan to third parties, other than the Government of Japan, shall be dealt with by Japan in accordance with the following provisions:
>
> (a) Claims shall be filed, considered and settled or adjudicated in accordance with the laws and regulations of Japan with respect to claims arising from the activities of its Self-Defense Forces.

STATEMENT OF THE FACTS

Petitioner, Richard G. Symanowicz, was a United States citizen in Japan on a resident visa status. He was married to a Japanese national and was employed by a small Japanese firm, Kei Motor Company.

On December 16, 1970, Petitioner was involved in an automobile accident while transporting a set of four tires from Misawa to Fuchu, Japan at the request of and for the benefit of the United States Army and Air Force Exchange Service. On that date, in lieu of driving because of inclement weather and his own weariness, Petitioner had originally scheduled a flight back to Fuchu from Misawa. Agents of the Exchange made several in-

sistent phone calls to Kei Motors and without Kei Motor Company's authorization, delivered the tires to Kei Motor Company to be transported by Petitioner. Petitioner, after much persuasion, cancelled his flight and agreed to drive the tires to Fuchu on the Exchange's promise to "take care of everything". During the trip, a serious accident occurred between Petitioner and an unlit truck. Subsequent to the accident, the Exchange took possession of the tires and presumably completed delivery. Petitioner was seriously injured in the accident. He was taken to a Japanese hospital and remained there until being released on January 8, 1971.

On January 15, 1971, Petitioner was admitted to the Base hospital in Misawa after being cleared for treatment as an employee.[1] After examination by a neurosurgeon he was advised that he would need surgery at the Tachikawa Air Force Base Hospital. Petitioner was subsequently denied admittance to Tachikawa because he was told he was not an Exchange employee, the foregoing despite his previous designation as an employee.

As a result of the lack of additional treatment for his injuries, Petitioner remains permanently disabled.

Administrative proceedings in Japan, held by the Tachikawa Compensation Bureau pursuant to Japanese law, found that Petitioner could not collect workers' compensation from Japan because he was not performing work for Kei Motor Company. Under Japanese law[2] Petitioner

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1. Petitioner was originally advised, on or about January 9, 1971 that under the Status of Forces Agreement only civilian employees or a member of the military could be treated at the Base hospital.

2. Japanese Labor Standards Law and Enforcement Ordinance, Ch. I, Art. 8, 9 and 10, Law No. 49 (April 7, 1949).

was found to be a worker (i.e. employee) of the U.S. Exchange.[3]

Subsequently, Petitioner began to aggressively pursue his workers' compensation claim against the Exchange. Jurisdiction at first instance was invoked pursuant to 33 U.S.C. Section 901 et seq., as extended by 5 U.S.C. Section 8171.

In an order dated March 26, 1979, the Administrative Law Judge in the U.S. Department of Labor determined that Petitioner was not an employee of the Exchange at the time of the accident, and denied Petitioner's claim. The Benefits Review Board affirmed the decision on November 28, 1980. The Petitioner timely and properly appealed the decision in the United States Court of Appeals for the Seventh Circuit, where the administrative decision was reaffirmed.

In each decision, tests for determining independent contractor status versus servant, employee or borrowed employee status were considered. The decisions also looked to case law pursuant to the Longshoremen's and Harbor Workers' Compensation Act (hereinafter referred to as "the Act"), the statute regulating Petitioner's claim. The Seventh Circuit agreed with the administrative law judge's finding that Petitioner was acting as a "volunteer".

At each step of these proceedings, Petitioner has made reference to the Treaty of Mutual Cooperation and Security Between the United States and Japan and Status of Forces Agreement (hereinafter referred to as "the

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3. In Re Appeal of Kei Jidosha Hanbai K.K. Contract No. BJ 700102 and BJ 700103, ASBCA No. 16900 (Appeal of Sept. 12, 1972, Tokyo, Japan).

Treaty"), as it affected his employee status (A.L.J. Transcript, at 46-47). Both Petitioner and opponent counsel discussed the Japanese proceedings at length (A.L.J. Transcript, at 75, 81, 96+).

One of Petitioner's primary issues on appeal before the Seventh Circuit was that the Treaty mandated a different decision.

The Petition for Rehearing En Banc before the Seventh Circuit included a translation of Japanese law which was relevant to the outcome of this case pursuant to the Treaty. The Petition was denied.

REASONS FOR GRANTING THE WRIT

Judicial notice has never been given to the Treaty since the start of these lengthy United States proceedings in 1975. Petitioner has, for twelve years, suffered in legal limbo because of the conflict in workers' compensation law between the United States and Japan and the grievous omission of the courts to give notice to the Treaty, which serves to avoid such conflict.

Chaos in international law will result if the courts are permitted to ignore multi-government agreements such as the Treaty.

I. THE TREATY OF MUTUAL COOPERATION AND SECURITY BETWEEN THE UNITED STATES OF AMERICA AND JAPAN AND STATUS OF FORCES AGREEMENT SHOULD BE GIVEN JUDICIAL NOTICE AND REVIEW IN A WORKERS' COMPENSATION CLAIM WHERE FAILURE TO DO SO CREATES AN INTERNATIONAL CONFLICT OF LAW AND RESULTS IN AN UNJUST DECISION TO CLAIMANT.

A. Judicial Notice Must Be Given to the Treaty.

Article VI, Clause 2, of the United States Constitution provides that treaties made under the authority of the United States "shall be the supreme law of the land".

A United States treaty is the law of the land and all state and federal courts are bound to take judicial notice. *United States v. Rauscher*, 119 U.S. 407 (1886). A treaty is to be construed on principles similar to those applied to contracts and statutes. *Sullivan v. Kidd*, 254 U.S. 433 (1921). A written declaration, annexed to a treaty at the time of its ratification, is as obligatory as if the provisions had been inserted in the body of the treaty itself. *Doe ex dem Clark v. Braden*, 16 U.S. 635 (1853).

The United States-Japanese Treaty presently at issue was signed by representatives of both countries on January 19, 1960 and ratified in June, 1960. It is therefore a binding law to which judicial notice must be given.

B. Proper Notice to Applicable Sections of the Treaty and Japanese Proceedings Held Pursuant to the Treaty Would Mandate a Decision in Favor of Petitioner and Avoid an International Conflict of Law.

A Treaty supercedes a prior act of Congress. Otherwise, the declaration in the Constitution that a treaty "shall be the supreme law of the land" would not have due effect. *United States v. Lee Yen Tai*, 185 U.S. 213 (1901); *J. Ribas y Hijo v. United States*, 194 U.S. 315 (1904).

When the question is whether an act of congress has been superceded in whole or in part by a subsequent treaty, effect must be given to both so far as possible. *United States v. Lee Yen Tai, supra.*

The opinion rendered by the lower tribunals in this claim looked to common law and the Longshoremen's and Harbor Workers' Compensation Act, which was enacted March 4, 1927. The Treaty became enforceable as law on June 23, 1960 and clearly supercedes the law by which Petitioner's claim has been rejected.

The Treaty mandates that claims such as Petitioner's be determined pursuant to Japanese law. Japanese proceedings, pursuant to the Treaty, have determined that Petitioner was working for the Exchange. The present ruling by the United States tribunals is in direct conflict with the Japanese decision and infringes upon applicable sections of the Treaty. Effect must be given to both the Treaty and the Act to avoid the present conflict.

C. Proper Judicial Notice and Review of the Treaty Will Avoid Conflicts of International Law and Will Result in a More Just Decision.

In interpreting and applying the provisions of the Act, traditional legal concepts should not be binding. Statutory terms should be given broad application to accomplish the remedial aims of the statute. *Michigan Mutual Liability Co. v. Arrien*, 233 F. Supp. 496, *affd.* 344 F.2d 640, *cert. den.* 382 U.S. 835 (1964). The Act should be liberally construed. *Baltimore & Philadelphia S.B. Co. v. Norton*, 284 U.S. 408 (1932).

In view of its beneficant purposes, the Act is to be given liberal construction. *Pillsbury v. United Engineering Co.*, 342 U.S. 197 (1952). Liberal construction of the Act in conformance with its purpose "should avoid harsh and incongruous results". *Northeast Marine Terminal Co. v. Caputo*, 432 U.S. 249 (1977).

Case law regarding the Act demonstrates an effort by the courts to look to equity in resolving such claims. Had the lower courts given effect to both the Treaty and the Act at issue, the present conflict could have been avoided through the equitable allowances provided by the Act.

Further, failing to give judicial notice to the Treaty unjustly leaves Petitioner with no remedy or source of compensation.

CONCLUSION

The Constitution requires that judicial notice be given to the Treaty. Failure to do so has resulted in a decision which creates a conflict between the laws of the United States and Japan and leaves a United States citizen with no forum for his workers' compensation claim.

By giving proper notice to the Treaty in concert with the equitable application of the Act, the lower courts can avoid an international conflict of law and construct a remedy which will fairly compensate Petitioner for his serious and permanent injuries.

Respectfully submitted,

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APPENDIX A

Opinion of the Court of Appeals for the Seventh Circuit

(Argued January 4, 1982 - Decided March 16, 1982)

No. 81-1075

IN THE
UNITED STATES COURT OF APPEALS
FOR THE SEVENTH CIRCUIT

RICHARD G. SYMANOWICZ,
Petitioner,

v.

ARMY AND AIR FORCE EXCHANGE SERVICE,

and

EMPLOYERS INSURANCE OF WAUSAU,

and

DIRECTOR, OFFICE OF WORKERS' COMPENSATION PROGRAMS, UNITED STATES DEPARTMENT OF LABOR,
Respondents.

ON PETITION FOR REVIEW OF AN ORDER OF THE BENEFITS REVIEW BOARD

Before PELL, *Circuit Judge*, MARKEY, *Chief Judge*,* and SPRECHER, *Chief Judge*.

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*Howard T. Markey, Chief Judge of the United States Court of Customs and Patent Appeals, is sitting by designation.

MARKEY, *Chief Judge.* Petition from an order of the Benefits Review Board (Board) denying coverage under the Longshoremen's and Harbor Workers' Compensation Act (LHWCA, 33 U.S.C. §901 et seq. (1976)), as extended by the Non-Appropriated Fund Instrumentalities Act, 5 U.S.C. §8171 (1976). We affirm.

Background

Richard Symanowicz was involved in an automobile accident in the early morning of December 16, 1970, while enroute from Misawa to Tokyo, Japan. Misawa is approximately 750 kilometers north of Tokyo.

Kei Motor Company (Kei) was a Japanese company engaged in the automobile repair business, having locations in Misawa and in Fuchu, near Tokyo. During 1970 Kei operated facilities at several United States Air Force bases, including those in Misawa and Fuchu, under contract from the Japanese Regional Exchange, a part of the Army and Air Force Exchange Service (Exchange). By early December, 1970, however, Kei had terminated operations at those bases, continuing its operation at Yokota Air Force Base.

Symanowicz, an American citizen, was an employee and director of Kei and husband of Kei's president. He supervised company operations in Misawa and Tokyo, spending approximately half of each month in each city.

On December 15, 1970, Masao Kamioka, manager of the auto parts department at Fuchu Air Force Base and an Exchange employee, telephoned Kimie Kurumada, manager of Kei, Fuchu. Kamioka inquired whether Symanowicz was in Misawa and, if so, whether he could drive to Tokyo by noon on December 16, 1970, with four snow tires.

When Ms. Kurumada contacted Symanowicz in Misawa, the latter advised that there was no contract with Fuchu Air Force Base, that he was not authorized to enter Misawa Air Force Base, and that he already had plane reservations to Tokyo. Ms. Kurumada relayed the information to Mr. Kamioka, who said, "Don't worry about it, we'll take care of everything."

Mr. Kamioka then arranged for the delivery of the snow tires from Misawa Air Force Base to Kei, Misawa. The tires arrived in the afternoon of December 15, 1970, and were loaded into a car owned and furnished by Kei. Symanowicz called Kei, Fuchu to advise that he would be driving back, and began the trip that evening. Shortly after midnight, he suffered severe injuries in a collision with a truck stopped on the highway.

Symanowicz was taken to a Japanese hospital, where he remained until January 8, 1971. On or about January 12, 1971, he requested treatment at the United States military hospital at Misawa. The following morning, he was notified by the Base Exchange Manager's Office that he was cleared for treatment as an employee. On January 15, 1971, Symanowicz was admitted to the hospital at Misawa, examined by a neurosurgeon, and asked to return in three days. When he returned, he was advised that he would need surgery at the Tachikawa Air Force Base hospital. Symanowicz was denied admission to Tachikawa, however, because he was not an Exchange employee.

Symanowicz filed a workers' compensation claim against the Exchange on February 5, 1975, asserting that he was an Exchange employee at the time of the accident. The Administrative Law Judge (ALJ) considered: (1) ten factors in Restatement of Agency 2d §220 relating to servant v. independent contractor status; (2) nine factors in

Gaudet v. Exxon Corp., 562 F.2d 351 (5th Cir. 1977), relating to "borrowed employee" status; and (3) four factors in *Gordon v. Commissioned Officers' Mess, Open*, 8 BRBS 441 (1978), relating to employee v. independent contractor status. The ALJ concluded that Symanowicz was neither an Exchange employee nor an independent contractor, but was a volunteer assisting the Exchange in furtherance of his own or his employer's interest. Accordingly, on March 20, 1979, the ALJ denied coverage.[1]

In affirming the ALJ's decision on November 28, 1980, the Board approved application of the *Gaudet* test, saying:

> The administrative law judge in this case applied *Gaudet* . . . The *Gaudet* test is one of the tests that we find acceptable when applied pursuant to an extensive review of the facts in relation to the requirements of that test. *See also Gordon v. Commissioned Officers' Mess, Open* . . . .
>
> *Gaudet* noted that nine factors are to be weighed "as appropriate in each particular case," and that no single factor or combination of factors is decisive, and that no fixed test is used to determine whether a bor-

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1. The ALJ found that "if any relationship existed between claimant and the Exchange other than a simple business accommodation or favor by claimant, it was one of independent contractor status [Emphasis added]." Because we hold *infra* that substantial evidence supports the finding that Symanowicz was a volunteer, we agree with the ALJ that he was neither an Exchange employee nor an independent contractor.

In *Kei Jidosha Hanbai K.K.*, 73-1 BCA §9982 (1973), Kei argued that Symanowicz was "at the time of the accident, acting as either an employee or agent of the Exchange because delivery of tires was not called for in the contracts between [Kei] and the Exchange and, hence, [Symanowicz], by agreeing to the Exchange's request, entered into an independent contractual relationship with the Exchange." The Board of Contract Appeals disagreed, finding that Kei "clearly rendered the service requested by the Exchange as a matter of personal and business accommodation . . . and as a voluntary favor."

rowed employee relationship exists. *Gaudet* at 355. Thus, it is up to the administrative law judge to evaluate the relative weight of each point and to decide if, taken together, the facts indicate that such a relationship exists.

A dissenting Board member argued that *Gaudet* emphasizes an employer's right to control the employee as determinative of an employer-employee relationship, while *Oilfield Safety and Machine Specialties, Inc. v. Harman Unlimited, Inc.*, 625 F.2d 1248 (5th Cir. 1980), decided after the ALJ's decision, held that the proper test for an employer-employee relationship in workmen's compensation cases is the "relative nature of the work" test. Accordingly, the dissent would have remanded to the ALJ for further proceedings, focusing on the nature of Symanowicz's trip in relation to the regular business of the Exchange.

Issue

Whether an employer-employee relationship existed between the Exchange and Symanowicz at the time of the accident.

Opinion

Symanowicz argues that the Exchange, having initially accepted responsibility for his medical treatment, is estopped from denying his employee status. Though we are referred to no legal authority as basis for applying an estoppel theory, we shall assume, without deciding that under some circumstances estoppel may apply. *Vf. Dicks v. Cleaver*, 433 F.2d 248 (5th Cir. 1970) (Automobile negligence suit, wherein the central issue was whether plaintiffs were employees of defendant at the time of the accident. Case remanded for the admission of

additional testimony to resolve the question whether plaintiffs were estopped from denying employee status). On the present facts, however, estoppel does not apply. The Exchange merely granted Symanowicz's request to be admitted as an employee to the hospital at Misawa on January 15, 1971. He was there X-rayed, examined by a neurosurgeon, and asked to return in three days. The Exchange made no promises, that it would provide surgery at Government expense or otherwise. The Exchange made a final decision that Symanowicz did not qualify for benefits as an Exchange employee. It has consistently adhered to that position. The legal issue is whether Symanowicz was an employee of the Exchange at the time of the accident. The subsequent action of the Exchange, in initially admitting him to the hospital, did not affect the determination of that issue, particularly where, as here, it is not established that Symanowicz relied to his detriment on any action of the Exchange subsequent to the accident. We therefore find no error in the Board's treatment of this argument.

Symanowicz's argument that he was a "borrowed employee," working for the Exchange at the time of the accident, lacks support in the statute and case law. Under 5 U.S.C. §8171(a), the LHWCA extends to "an employee of a nonappropriated fund instrumentality described by [5 U.S.C. §2105(c)] who is . . . a United States citizen . . . employed outside the continental United States." Under 5 U.S.C. §8171(b), "the term 'employer' in [the LHWCA] includes the nonappropriated fund instrumentalities described by [5 U.S.C. §2105(c)]." Section 2105(c) contains no definition of "employee," but refers to employees *paid* from nonappropriated funds of the instrumentalities named therein including the Exchange. Therefore, to qualify as an Exchange employee entitled to workers com-

pensation, a statutory prerequisite is that an individual be paid or have an agreement to be paid from nonappropriated funds of the Exchange.

As stated in 1C Larson, *The Law of Workmen's Compensation* §47.41 (1980), "By contrast with the common law of master and servant, which recognized the possibility of having a gratuitous servant, the compensation decisions uniformly exclude from the definition of 'employees' workers who neither receive nor expect to receive any kind of pay for their services (Footnotes omitted]." For example, in *Kubik v. Farmers Union Oil Co.*, 209 N.W. 2d 551 (S.D. 1973), plaintiff, a customer at defendant's place of business, was asked by defendant's employee to deliver a propane tank to a neighbor on his way home. Plaintiff, who was not on defendant's payroll and was at defendant's place of business only to make a purchase, agreed and attempted to load the tank alone, injuring his foot. The court held that plaintiff was a "gratuitous employee" not eligible for workmen's compensation. *Id.* at 553.

One type of gratuitous worker is "the volunteer who assists another person with a view in part to furthering either his own or his own employer's interest . . . There is almost no limit to the variety of kinds of self-interest that may appear in this class of cases." Larson, *supra*, §47.41(c). For example, in *Freedman v. Wolfswinkel*, 19 Ariz. App. 307, 506 P.2d 1092 (1973), plaintiff's deceased had recently passed the real estate salesman's license examination and was acting as hostess for guests of the defendant real estate developers at an outing on their premises. She received no monetary compensation, benefiting only by payment of her expenses and the experience attendant to the task. She was killed in the course of her activities. Although the developers sought to limit

recovery to workmen's compensation, the court allowed a negligence action, ruling that plaintiff's deceased was not an employee for workmen's compensation purposes.

We agree with the Board that there is substantial evidence on the record as a whole to support these ALJ findings: (1) the Exchange requested Symanowicz to drive from Misawa to Fuchu, bringing with him four snow tires; (2) Symanowicz was an employee and director of Kei and husband of the company's president; (3) Kei had a business relationship with the Exchange, unrelated to the delivery of tires, and the request to Symanowicz was prompted by that relationship; (4) Symanowicz would have returned to Fuchu that evening anyway as part of his normal duties for Kei; (5) neither the Exchange nor Symanowicz was in the business of transporting tires; (6) the Exchange's statement "We'll take care of everything" is consistent with reimbursement of expenses plus a gratuity; and (7) Symanowicz received no payment for transporting the tires.

Accordingly, we agree that substantial evidence supports the ALJ's finding that "claimant was a gratuitous worker, a volunteer, who assisted another person, the Exchange, with a view in part to furthering either his own or his employer's interest, since he was a director and husband of the chief officer of a company which had other business relationships with the Exchange."

The ALJ's findings of fact may be reversed only if unsupported by substantial evidence. *Oilfield Safety*, 625 F.2d at 1254. In reviewing administrative findings, this court must not substitute its judgment for that of the agency, *id.*, and it is immaterial that the facts may permit the drawing of different inferences, or even that we may have reached a different conclusion on the same facts.

Peabody Coal Co. v. Benefits Review Bd., 560 F.2d 797, 802-03 (7th Cir. 1977).

Symanowicz and the Director, Office of Workers' Compensation Programs, argue that the ALJ and Board majority erred as a matter of law in applying the restrictive, common-law "right to control" test to deny Symanowicz's status as an Exchange employee. They seek a remand to the Board for application of the more inclusive "relative nature of the work" test, arguing that that test best promotes the purposes and policies of the LHWCA and citing Larson, *supra*, §43.00 et seq.; *Haynie v. Tideland Welding Service*, 631 F.2d 1242 (5th Cir. 1980); and *Oilfield Safety*, 625 F.2d at 1248. The argument lacks merit.

First, the ALJ did not simply apply a naked right-to-control test. He found Symanowicz to have been a "volunteer." Though the Board opinion discusses *Gaudet* and the right to control test, it affirmed the findings of the ALJ, the most critical of which is that Symanowicz was a volunteer.

Moreover, the workmen's compensation concept of "employee" is *narrower* than the common-law concept of "servant" in one important respect, namely, the employee receives or expects to receive pay for his services, whereas the servant may work without pay. Larson, *supra*, §47.00 et seq. In view of our holding that Symanowicz was a mere volunteer, he cannot qualify as an "employee" for compensation purposes.

The *Oilfield* and *Haynie* cases are distinguishable. In *Oilfield*, 625 F.2d at 1248, Clarence Hansen was injured while making a safety inspection of an oil drilling platform in the Gulf of Mexico. Though Oilfield Safety, Inc. and Harman Unlimited, Inc. each denied liability, the ALJ and the board found that both were Hansen's em-

ployers at the time of the accident, making them jointly and severally liable for his workers' compensation benefits under the LHWCA.

The question in *Oilfield* was not whether Hansen was a paid employee entitled to compensation benefits, for that was undisputed, but rather whether Oilfield Safety or Harman Unlimited was Hansen's employer at the time of the injury. In resolving the question, the Fifth Circuit determined that the proper standard for deciding whether an individual is an employee is the "relative nature of the work" test, focusing on the nature of the individual's work in relation to the regular business of the employer. The court held that substantial evidence supported the administrative findings that the nature of Hansen's work in relation to the regular business of Oilfield Safety and Harman Unlimited made him an employee of both.

In *Haynie*, 631 F.2d at 1242, Fred Haynie was injured on an offshore oil rig and instituted suit against Tideland Welding Service (Tideland) under the LHWCA. Applying the "right to control" test, the ALJ found that Haynie was not an "employee" of Tideland and denied his claim for compensation. The board affirmed. Haynie appealed, contending that Tideland was his employer, bringing him within the coverage of the LHWCA.

Haynie was a paid worker, the sole issue being whether he was an "employee" of Tideland under LHWCA. The Fifth Circuit was unable to conclude that the administrative findings were supported by substantial evidence in light of the "relative nature of the work" test recently adopted in *Oilfield*. Because the court found the record on appeal inadequate to ascertain whether Haynie was a Tideland employee under the test, it remanded for further proceedings.

The present issue is not that involved in *Oilfield* or *Haynie*. If it were, it would then be necessary, of course, to decide whether the "relative nature of the work test" is appropriate for application. *Oilfield Safety*, 625 F.2d at 1254. Here, however, Symanowicz has been found, on substantial evidence, to have been a volunteer ineligible for coverage under the Acts on which his suit rested.

Accordingly, the order of the Board is affirmed.

AFFIRMED

A true Copy:
Teste:

.....

Clerk of the United States Court of Appeals for the Seventh Circuit

APPENDIX B

Decision and Order of the Benefits Review Board, U. S. Department of Labor

(Filed November 28, 1980)

No. 79-316

BENEFITS REVIEW BOARD
U.S. DEPARTMENT OF LABOR

RICHARD G. SYMANOWICZ
Claimant-Petitioner,

v.

ARMY AND AIR FORCE EXCHANGE SERVICE

and

EMPLOYERS INSURANCE OF WAUSAU
Employer/Carrier-Respondents.

DECISION and ORDER

Appeal from the Decision and Order of GARVIN LEE OLIVER, *Administrative Law Judge*, United States Department of Labor.

KENT R. MINSHALL, Cleveland, Ohio, for the claimant. SIDNEY RAVKIND (MANDELL & WRIGHT), Houston, Texas for the employer/carrier.

Before: SMITH, *Chief Administrative Appeals Judge*, MILLER and KALARIS, *Administrative Appeals Judges*. SMITH, *Chief Administrative Appeals Judge*:

This is an appeal by the claimant from the Decision and Order (76-LHCA-114) of Administrative Law Judge

Garvin Lee Oliver pursuant to the provisions of the Longshoremen's and Harbor Workers' Compensation Act, as amended, 33 U.S.C. §901 *et seq.*, as extended by the Nonappropriated Fund Instrumentalities Act, 5 U.S.C. §8171 (hereinafter referred to as the Act).

Claimant was an employee and director of Kei Jidosha Hanbai Kabushiki Kaisha (hereinafter, Kei Motors), a Japanese company which sells and repairs automobiles. Kei Motors had contracts with the Japanese Regional Exchange (hereinafter, JRE) to operate automobile repair facilities. Kei Motors also had other operations unconnected with the JRE. In the course of business, claimant maintained two offices, one in Misawa and one in Fuchu, near Tokyo. Claimant spent approximately one-half of each month in each office. He had full use of a company car at each location. Since the two cities are about 700 kilometers apart, claimant usually commuted between the two by commercial airline, leaving an automobile in each city. On December 16, 1976, claimant was injured in an automobile accident while driving from Misawa to Tokyo.[1] At the time of the accident, claimant was transporting tires from Misawa which were to be delivered to the Japanese Regional Exchange at Fuchu.

Claimant sought compensation for permanent total disability from the Japanese Regional Exchange, which is a part of the Army and Air Force Exchange Service (hereinafter, employer), a non-appropriated fund instrumentality. Claimant argues that at the time of his accident he was a borrowed employee of JRE and was thus covered by the Act. The administrative law judge to whom

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1. It is uncontested that the accident resulted in serious permanent impairment to claimant's hearing, equilibrium, facial nerves, and to certain memory functions.

the case was referred found that claimant was not a borrowed employee of JRE and therefore was not entitled to benefits under the Act.

Claimant appeals the finding. Claimant primarily argues on appeal that the administrative law judge incorrectly weighed the evidence in determining that claimant was not a borrowed employee of JRE at the time of his accident.

Claimant bases his argument on the following: instead of flying, claimant drove back to Tokyo, for the sole purpose of transporting four tires which were needed by a special customer of JRE; he was transporting the tires only because the JRE base exchange auto parts manager at Fuchu had repeatedly asked that he do so; and the auto parts manager actually had the tires delivered to claimant's office despite claimant's refusals. Moreover, claimant asserted that he expected to get paid for his work, in reliance on the parts manager's statement to the Kei Motors Misawa office manager that, "We'll take care of everything." This, claimant contends, is adequate to support a finding that claimant was a borrowed employee.[2]

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2. Claimant makes several additional arguments which require comment. First claimant argues that since JRE initially accepted responsibility for claimant's medical treatment, it is estopped from denying employer status. We can find no basis for applying a promissory estoppel argument to resolve the legal question of employer status.

Claimant also argues that, since another government agency, the U.S. Board of Contract Appeals, found claimant not to have been an employee of Kei Motors at the time of the accident, that agency's finding is binding on the administrative law judge. Thus, claimant argues that, if he was not an employee of Kei Motors, then he must have been an employee of JRE at the time of the accident. As a preliminary matter, we note that such a finding by the U.S. Board of Contract Appeals is not directly substantiated by the record. However, even accepting such a

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The administrative law judge in this case applied *Gaudet v. Exxon Corp.*, 562 F.2d 351, 6 BRBS 712 (5th Cir. 1977). The *Gaudet* test is one of the tests that we find acceptable when applied pursuant to an extensive review of the facts in relation to the requirements of that test. *See also Gordon v. Commissioned Officers' Mess, Open*, 8 BRBS 441, BRB No. 77-220 (1978).

Gaudet noted that nine factors are to be weighed "as appropriate in each particular case," and that no single factor or combination of factors is decisive, and that no fixed test is used to determine whether a borrowed employee relationship exists. *Gaudet* at 355. Thus, it is up to the administrative law judge to evaluate the relative weight of each point and to decide if, taken together, the facts indicate that such a relationship exists.

The administrative law judge concluded that the principal requirements for a borrowed employee relationship —the right of the employer to control the details of the work, which party provides the equipment and work site, whose work is being performed, a meeting of the minds of the original and "borrowing" employer, the right to discharge and obligation to pay the employee—did not exist in this case. He therefore concluded that:

> [u]nder the facts of the case, the most logical and compelling finding is that Claimant was a gratuitous

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Footnote continued—

holding, the administrative law judge would not be compelled as a matter of law to accept claimant's collateral argument that if he was not an employee of Kei he was therefore an employee of JRE.

Claimant additionally contends that he must have been a borrowed employee since independent contractor status would be violative of Japanese law. We do not believe such potential illegality dictates a finding that claimant is a borrowed employee.

> worker, a volunteer, who assisted another person, the Exchange, with a view in part to furthering either his own or his employer's interest, since he was a director and husband of the chief officer of a company which had other business relationships with the Exchange. . . . An analysis of the above factors listed above [sic] also leads to the conclusion that if any relationship existed between Claimant and the Exchange other than a simple business accommodation or favor by Claimant, it was one of independent contractor status.

Decision and Order at 10-11.

Claimant argues that "the trial record indicates that claimant offered unrebutted evidence sustaining [seven of the nine] requirements" set out in *Gaudet v. Exxon Corp., supra.* Cl. Brief at 5. Claimant continues, "In *Gordon v. Commissioned Officers' Mess, Open,* . . . again, all of the elements therein fit the actions of claimant." Cl. Brief at 6. We do not agree with claimant's contentions. We note, for example, concerning one of *Gaudet's* standards—control of work—that JRE merely delivered tires to claimant, and asked that they be delivered to Fuchu by noon the next day. Claimant was given no travel or route instructions, he was merely given a deadline by which time the tires had to be delivered. Another requirement under *Gaudet* is that there be a meeting of the minds between employers. There was no evidence introduced which indicated that either claimant's employer or any official of JRE with authority to hire was even aware that this incident transpired, let alone that they had entered into an agreement concerning claimant.

We note that the administrative law judge also stated in his decision that:

> [for claimant] to undertake a journey comparable to a trip from New York to Chicago in bitter winter weather without expectation of reward is illogical and not compelling.

Decision and Order at 10. However, the administrative law judge went on to say that mere expectation of reward is not enough to create an employer-employee relationship. We conclude that the term "reward" as used by the administrative law judge is not necessarily synonymous with payment for purposes of establishing status as a borrowed employee. The term "reward" in this case appears to be more closely connected with building up goodwill.

It is clear that the administrative law judge thoroughly reviewed the evidence before him and applied it to the applicable law.[3] It is immaterial that the facts

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3. We note the dissent bases its conclusion on *Oilfield Safety and Machine Specialties, Inc. v. Harman Unlimited, Inc.*, ____ BRBS ____, 625 F.2d 1248 (5th Cir. 1980). In *Oilfield Safety* the administrative law judge applied a "relative nature of the work test," and found joint and several liability of the two alleged employers; and the Board affirmed. The court in turn affirmed the Board, stating, "These findings of fact [on whether the alleged employers were employers of the claimant] may be reversed only if they are not supported by substantial evidence . . . This court, however, is unable to say that the finding that an employee relationship existed is unreasonable."

The court did state that the "test that best suits the principles of the LHWCA is the one applied by the administrative law judge and the Board" and adopted that test. It did not, however, reject the approach made in *Gaudet*, although it did reiterate its warning in *Gaudet* that the right to control test cannot be applied "blindly." The court finally stated that the "factors ['composing the right to control test'] should be used in determining the existence of an employer-employee relationship."

It should be stressed that in *Oilfield Safety* each employer was contending that it had no control over the details of work of the claimant, and both employers were advancing application of a pure traditional common-law "right to control" test. The

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might permit the drawing of different inferences, or even that we may have reached a different conclusion on the same facts. *Tangorra v. National Steel and Shipbuilding Company*, 6 BRBS 427, BRB No. 76-328 (1977); *Cardillo v. Liberty Mutual Insurance Company*, 330 U.S. 469 (1947); *Atlantic and Gulf Stevedores v. Director, Office of Workers' Compensation Programs*, 542 F.2d 602 (3rd Cir. 1976). Since there is substantial evidence to support the findings of fact, the findings are not irrational, and they are in accordance with law, we must affirm the administrative law judge's decision. *Banks v. Chicago Grain Trimmers Ass'n*, 390 U.S. 459 (1968).

SO ORDERED.

/s/ SAMUEL J. SMITH
Administrative Appeals Judge

I Concur:

/s/ ISMENE M. KALARIS
Administrative Appeals Judge

MILLER, *Administrative Appeals Judge*, dissenting:

I respectfully dissent from the majority's decision which denies coverage for the claimant.

The majority recognizes that the administrative law judge applied *Gaudet v. Exxon Corp.*, 6 BRBS 712, 562 F.2d 351 (5th Cir. 1977) to find that claimant was not a borrowed employee. *See* Decision and Order at 8-9. *Gaudet* and the other standards cited by the administra-

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Footnote continued—

statements referred to in the dissenting opinion, which suggest total disapproval of that test, were made in disapproving application of that test in that case, although the court stated, "Indeed, in many cases, the traditional right to control test will produce a result that is appropriate in the LHWCA [the Act] context."

tive law judge place utmost importance on employer's right to control the activities of the employee as determinative of the existence of the employee-employer relationship. In finding that claimant was not a borrowed employee, but at most an independent contractor, the administrative law judge relied primarily on the absence of right to control.

However, the Fifth Circuit has clarified *Gaudet* in *Oilfield Safety and Machine Specialties, Inc. v. Harman Unlimited, Inc.*, BRBS , 625 F.2d 1248 (5th Cir. 1980). In *Oilfield Safety* the court held that the "right to control" test and other common law standards may be inappropriate in the context of workers' compensation since the scope of status under the Act mandates an expansive view of coverage and "[t]he *right to control test tends to exclude and thus is inappropriate* for the [Act]." 625 F.2d at 1253 (emphasis added).

The court goes on to hold that the right to control test may be relevant, but must not be determinative where the "test simply produces an inappropriate conclusion." 625 F.2d at 1254. In the context of the Act, the court adopts the relative nature of the work test which focuses on "the nature of the claimant's work in relation to the regular business of the employer." 625 F.2d at 1253.

While the administrative law judge analyzed several factors, it is manifest that ultimate reliance was placed on the lack of employer control and specific method of payment. *See* Decision and Order at 10. In denying the claim, the administrative law judge failed to apply the test which best promotes the background and policies of the Act since "[i]n the area of workers' compensation, *the employee-employer test should be inclusive.*" 625 F.2d at 1253 (emphasis added). The decision is therefore not in accordance with law.

I would remand this case and have the administrative law judge apply the relative nature of the work test as required by *Oilfield Safety*, bearing in mind that exclusion is the exception and not the rule.

/s/ JULIUS MILLER
Administrative Appeals Judge

APPENDIX C

Decision and Order of the Administrative Law Judge, U. S. Department of Labor

(Dated March 26, 1979)

Case No. 76-LHCA-114

OWCP No. 15-12736

U.S. DEPARTMENT OF LABOR
OFFICE OF ADMINISTRATIVE LAW JUDGES
Suite 700-1111 20th Street, N.W.
Washington, D.C. 20036

In the Matter of:
RICHARD G. SYMANOWICZ
Claimant

v.

ARMY & AIR FORCE EXCHANGE SERVICE
Employer

and

EMPLOYERS INSURANCE OF WAUSAU
Carrier

KENT R. MINSHALL, ESQUIRE
2305 Terminal Tower
Cleveland, Ohio 44113
For the Claimant

SIDNEY RAVKIND, ESQUIRE
MANDELL & WRIGHT
806 Main Street, 21st Floor
Houston, Texas 77002
For the Employer
and Carrier

Before: GARVIN LEE OLIVER
Administrative Law Judge

DECISION AND ORDER

This is a claim for compensation under the Longshoremen's and Harbor Workers' Compensation Act, as amended, 33 U.S.C. §901 *et seq.*, as extended by the Non-Appropriated Fund Instrumentalities Act, 5 U.S.C. §8171, together with the Regulations governing the administration of the Act, 20 C.F.R. 701 and 702.

A hearing was held in this matter in Cleveland, Ohio. The record was left open until December 28, 1978 to enable the parties to submit additional evidence. Claimant's Exhibits 3 and 4 are received, and the stipulation of testimony of Masao Kamioka and Yoshima Uchida is received as Employer's Exhibit 10. Claimant's objection to the submission of a portion of the testimony of Mr. Kamioka is overruled.

The main issues presented for determination are (1) whether the claim was filed in a timely manner, (2) whether an employer-employee relationship existed between the Claimant and Employer, (3) the average weekly wage, and (4) the extent of disability.

The case arises from an automobile accident suffered by Claimant, Richard Symanowicz, in the early morning of December 16, 1970, while enroute from Misawa to

Tokyo, Japan. Misawa is located in the northern part of Japan and is approximately 759 km from Tokyo. It is undisputed that at the time of the occurrence the Claimant was a general employee and a director of Kei Motor Company. Claimant asserts that the circumstances which caused him to be making the trip from Misawa to Tokyo made him a special employee of the Japanese Regional Exchange. The Employer asserts that Claimant was not an employee of the Japanese Regional Exchange, special or otherwise, and that, in any event, the claim is barred by the lack of timely filing.

Based upon the entire record in this case, including the stipulations by the parties and the evidence adduced, I make the following Findings of Fact, Conclusions of Law, and Order. The proposed findings submitted by counsel have been given careful consideration and to the extent not adopted by this decision in the form proposed on in substance are rejected as not supported by the evidence or as immaterial.

Findings of Fact

Kei Motor Company is a Japanese company engaged in the used car business. At material times, it had locations in Misawa and the Tokyo areas. Further, Kei also had obtained contracts in 1970 from the Japanese Regional Exchange, a part of the Employer Army and Air Force Exchange Service, to operate automobile repair facilities at the United States Air Force bases located at Tachikawa, Fuchu, and Yokota. Sometime in December of 1970, Kei had terminated its operation at Misawa Air Force Base as well as its facilities at Tachikawa and Fuchu.

Claimant was an employee and a director of Kei Motors in 1970 and was the husband of the president of

the company. His duties consisted of supervising the company operation in Tokyo, and part of his time was spent in Misawa. Kei enjoyed other business than that obtained from the Japanese Regional Exchange and, to that end, operated a branch in Misawa.

Claimant arrived in Misawa, Japan on December 14, 1970, having gone there on private business in order to transport a civilian and her dog to that city. The lady gave him a gratuity of $75.00 for making the trip. On his trip to Misawa Claimant operated a vehicle owned by Kei Motors, which was assigned to Claimant as a part of his contract with Kei.

Claimant reported to work at the Misawa Kei Motors branch office on December 15, 1970. On December 15, 1970 at 1:15 p.m. Masao Kamioka, manager of the auto parts department at the Fuchu Air Force Base and an employee of the Japanese Regional Exchange, telephoned Kimie Kurumada, manager of the Kei Motors office in Fuchu, Tokyo. Mr. Kamioka inquired whether Claimant was in Misawa, and, if so, whether he could drive back to the Tokyo area and bring four snow tires back with him for an important customer. Mr. Kamioka knew Claimant because Kei Motors ran the Fuchu repair facility until November 1970. Mr. Kamioka had no authority to hire or fire employees and called Kei Motors because he thought Claimant might do him a favor.

Ms. Kurumada contacted Claimant in Misawa and was told by Claimant that Kei Motors had no contract with the Fuchu base exchange, and that he was flying back to Tokyo. When Ms. Kurumada told Mr. Kamioka this, and suggested that the tires be moved by military aircraft, Mr. Kamioka replied that there were no military flights that day. He reiterated the request that Claimant bring the tires back personally.

Ms. Kurumada telephoned Claimant again in Misawa and was told by Claimant that he had plane reservations, and, also, he had no pass authorization to enter the Misawa Air Base. Ms. Kurumada relayed this information to Mr. Kamioka who said, "Don't worry about it, we'll take care of everything."

Mr. Kamioka then called Yoshima Uchida of the Misawa parts department of the Exchange and asked him to arrange delivery of the four tires from the Misawa Air Force base to Claimant's place of business in Misawa.

As directed, Mr. Uchida sent the tires to the Kei Motors location by a jeep driven by a base driver. Mr. Uchida was not authorized to hire or fire employees, and the driver was not so authorized.

The tires arrived at the Kei Motors facility at about 4:30 p.m., December 15, 1970. They were loaded into Claimant's car, and he signed a receipt for them.

Claimant testified to a conversation he had at this time with the Misawa Base Exchange parts manager in which the manager allegedly said, "Don't worry about it. Turn in your bills that you spend for gasoline and this and that and they'll go ahead and take care of everything." (Tr. 40) However, I credit the stipulated testimony of Yoshima Uchida, the employee of the parts department of the Misawa Exchange, that the manager of the parts department at the time was Mr. Mamoru Tsushima, who was not involved in any of the conversations. I conclude that to the extent a comment, in the nature of, "Don't worry about it, we'll take care of everything" was made, that this was made by Mr. Kamioka in his conversation with Ms. Kurumada, as noted above.

Claimant called the Kei Motors office in Tokyo to advise that he would be driving back. Claimant began

driving to Tokyo in the Kei Motors vehicle about 9:00 p.m. that evening. Shortly after midnight, Claimant collided with the rear end of a truck stopped on the highway and suffered severe injuries. He was taken to a hospital at Mizusawa where he remained unconscious for ten days. The Employer learned of the accident and immediately sent flowers to Claimant.

Meanwhile, an employee of Kei Motors delivered the tires to the Kei Motors office in Tokyo. Mr. Kamioka of the Employer subsequently called Ms. Kurumada at Kei Motors to request that the tires be released to their customer. This was done. Mr. Kamioka expressed his sympathy for Claimant and remarked, "Don't worry about it. We'll take care of everything."

Claimant was discharged from the Mizusawa hospital on January 8, 1971. On or about January 12, 1971 he contacted Mr. Savana, manager of the Employer's Misawa base exchange, to request approval for treatment at the U.S. military hospital at Misawa as an employee of the Exchange. Mr. Savana said he couldn't make that decision and would contact the main office. The following morning Mr. Savana's secretary advised Claimant that his treatment at the hospital as an employee of the Exchange had been approved.

On approximately January 15, 1971, Claimant was admitted at the hospital. He was x-rayed, examined by a neurosurgeon, and asked to return on Monday, January 18, 1971. When he returned, he was advised that he needed surgery, but that it would have to be performed at the Tachikawa Air Force Base hospital. Claimant was unable to obtain military transportation to Tachikawa because he was told he was not an employee of the United States or the Exchange. Claimant secured transportation

on his own from Japanese Air Lines, but when he sought admission to the U.S. military hospital at Tachikawa, he was denied admission on the grounds that he was not an employee of the United States or the Exchange.

Shortly after these events, the Kei Motor contracts at Tachikawa and Yokota were cancelled by the Japanese Regional Exchange. Extended litigation ensued which resulted in a decision adverse to Kei Motors on all issues. While the claims being made by Kei in connection with the contract dispute are not entirely clear, it is shown by the documents that Claimant made a claim against Kei Motors for his injuries "while on TDY for the company" (Emp. Exh. 5), and that Kei made a claim against the Exchange to recover for damages to "Kei Jidosha's employee, Richard Symanowicz." (Emp. Exh. 6). On August 27, 1971, Attorney J. Bruce Henderson wrote a letter concerning the "Kei Jidosha injury claim for Mr. Richard Symanowicz." (Emp. Exh. 7).

On January 19, 1972, Claimant received from Major John Ciucci, a J.A.G. officer in the U.S. Air Force, certain blank forms pertaining to a workers' compensation claim against the Exchange. The instructions specified the compensation forms which should be submitted by the Employer to Exchange headquarters, including a "Staff Judge Advocate's Report" recommending appropriate action on the claim (Emp. Exh. 1), attached Exhibit C-1). On January 24, 1972, the attorney representing Claimant and Kei Motors, J. Bruce Henderson, clarified the claim which was actually being asserted at that time. He stated: "To avoid misunderstanding, it should be made clear that the claim is made by Kei Jidosha Hanbai K.K. against the Exchange pursuant to insurance coverage supplied by the Exchange and for which premiums were regularly paid by Kei Jidosha to the Exchange. The claim includes

liability for both personal injuries and damages to a Kei Jidosha vehicle, the latter "in the amount of approximately 400,000 yen." (Emp. Exh. 8). Kei Motors asserted in the contract dispute that it was entitled to compensation for transporting the snow tires. The Contract Review Board found that Kei Motors was not entitled to compensation for this service because Claimant acted as a volunteer. See *Kei Jidosha Hanbai K.K.*, ASBCA No. 16800, 73-1 BCA §9982 (CCH, p. 46,847) (March 21, 1973).

Claimant first filed a claim for compensation on February 5, 1975, (Emp. Exh. 3). An informal controversion of the Exchange was filed February 10, 1975, and a formal Answer to the Claim was filed March 14, 1975. (Emp. Exh. 4, 4A). No report of injury was filed by the Employer.

At the time of the injury Claimant received a salary including fringe benefits from Kei Motors of approximately $1,700 per month. This included housing valued at approximately $850 per month, telephone at approximately $300 per month, and vehicles valued at approximately $600 per month. Claimant did not receive any payment from the Exchange for transporting the tires.

Claimant is 54 years old. He has been employed throughout his career as an automobile mechanic, mechanic foreman, electrician, and engineer. The injury which is the subject of this claim left him deaf in the right ear, partially deaf in the left ear, and he suffers from nerve paralysis on the right side of his face and a loss of balance. There is no evidence that any type of employment is currently available to him.

Claimant received payment for loss of wages for two months and certain hospital bills were paid under the Japanese no-fault vehicle insurance program.

Conclusions of Law

There is a presumption of compensability contained in Section 20 of the Act which is grounded in the "humanitarian nature" of the Act. *Wheatley v. Adler*, 407 F.2d 307, 312 (1968). For this reason, it has been consistently held that the Act is to be liberally construed in favor of injured employees and their dependents, *Voris v. Eikel*, 345 U.S. 328, 333 (1953), and all doubts, including factual, are to be resolved in favor of the employee. *Vinson v. Einbinder*, 307 F.2d 387 (1962), *cert. denied sub nom. Aetna Casualty and Surety Co. v. Vinson*, 372 U.S. 934 (1963).

The record establishes that Claimant is permanently totally disabled and has been since the date of the accident, December 15, 1970.

Timeliness of Claim

Claimant did not file his claim for compensation within one year after the injury as required by Section 13(a) of the Act. However, Section 30(f) provides that where an employer/carrier has knowledge of an employee's injury and fails to file a report as required by Section 30(a), the one year time period under Section 13(a) does not begin to run against the claim until the report is filed.

The standard as set out by the Benefits Review Board is that "if the employer knows of the injury and has facts that would lead a reasonable man to conclude that a compensation liability is possible and that it therefore ought to investigate the matter further", *Melson v. United Brands Co.*, 6 BRBS 503, BRB No. 76-227 (1977), the one year time limitation for the filing of a claim does not run in the absence of the filing by the employer/carrier of the Section 30(a) notice.

The record establishes that the Exchange had almost immediate knowledge of the injury and sent flowers to Claimant at the hospital. (Claimant's Exh. 4). On or about January 12, 1971 Claimant requested Mr. Savanah, manager of the Employer's Misawa Air Force Base Exchange, to authorize medical treatment on the basis that he was an employee of the Exchange at the time he was moving the tires. (Tr. 48). Claimant secured certain blank compensation forms from the Staff Judge Advocate, Major Ciucci, on January 19, 1972 after discussing a possible claim against the Exchange with Major Ciucci. (Tr. 71-72, 109-110, 116). Major Ciucci indicated to Claimant that he had discussed the possible claim with the Exchange. (Tr. 72). In this connection, the forms provided to Claimant by Major Ciucci reflect that the Staff Judge Advocate is to provide Headquarters, PACEX, an organization apparently connected with the Exchange, with a report, including a recommendation on the claim. (Emp. Exh. 4, Attch. C-1). Thus, it is concluded that the Exchange had knowledge of facts from which it could reasonably conclude that a claim was possible, and that the Exchange's failure to file the Section 30(a) Notice prevented the one-year time period from running. Thus, the claim for compensation was timely.

Employer-Employee Relation

In *Hansen v. Oilfield Safety, Inc.*, 8 BRBS 835, BRB No. 78-304 (1978) the Benefits Review Board reiterated the factors to be considered in determining employee relationships which it had previously discussed in *Ronan v. Maret School, Inc.*, 1 BRBS 348 (1975), as taken from Restatement Agency 2nd §220, Subsection 2. These were:

a. The extent of control which, by the agreement, the master may exercise over the details of the work;

b. Whether or not the one employed is engaged in a distinct occupation or business;

c. The kind of occupation, with reference to whether in the locality, the work is usually done under the direction of the employer or by a specialist without supervision;

d. The skill required in the particular occupation;

e. Whether the employer of the workman supplies the instrumentalities, tools, and the place of work for the person doing the work;

f. The length of time for which the person is employed;

g. The method of payment, whether by the time or by the job;

h. Whether or not the work is part of the regular business of the employer;

i. Whether or not the parties believe they are creating the relation of master and servant, and

j. Whether the principal is or is not in business.

The Board also noted Comment "c" to Subsection 2, cited as relevant by the Supreme Court in *Baker v. Texas Pacific Ry. Co.*, 359 U.S. 227, 228 (1959).

c. "Generality of definition. • • •

The factors stated in Subsection (2) are all considered in determining the question, and it is for the triers of fact to determine whether or not there is a sufficient group of favorable factors to establish the relation. See Comment g. If the inference is clear and there is, or is not, a master and servant relation, it is made by the court; other-

wise, the jury determines the question after instruction by the court as to the matters of fact to be considered."

The issue of special employee or borrowed servant has not been directly addressed by the Benefits Review Board. However, the courts have confronted the problem on a number of occasions in the context of the Act. *Gaudet v. Exxon Corp.*, 6 BRBS 712 (5th Cir. 1977) is a case in point. There the Court articulated nine factual inquiries to generally resolve the issue whether the employee of one employer is to be considered the borrowed servant of another employer.

(1) Who has control over the employee and the work he is performing, beyond mere suggestion of details or cooperation?

(2) Whose work is being performed?

(3) Was there an agreement, understanding, or meeting of minds between the original and the borrowing employer?

(4) Did the employee acquiesce in the new work situation?

(5) Did the original employer terminate his relationship with the employee?

(6) Who furnished the tools and place for performance?

(7) Was the new employment over a considerable length of time?

(8) Who had the right to discharge the employee?

(9) Who had the obligation to pay the employee? 6 BRBS at 714. To resolve the issue under the Act, the Court stated:

> The principal focus * * * should therefore be: (1) was the second employer responsible for the working conditions experienced by the employee, and the risks inherent therein and, (2) was the employment with the new employer of such duration that the employee could be reasonably presumed to have evaluated the risks of the work situation and acquiesced thereto? 6 BRBS at 715.

In a slightly different context, the Benefits Review Board has discussed factors, also common to the above, which go to resolve the issue of independent contractor or employee status. That issue, according to the Board, is determined by whom has the right to control the details of work which can be inferred from

(1) evidence of right or exercise of control;

(2) method of payment;

(3) the furnishing of equipment; and

(4) the right to fire.

Gordon v. Commissioned Officers' Mess, Open, 8 BRBS 441, BRB No. 77-220 (1978).

The record reflects that the Exchange requested Claimant to perform a single task of brief duration by driving back to the Tokyo area and bringing four tires with him. Claimant was a director of Kei Motors and the husband of the president of the company. Kei Motors had a business relationship with the Exchange, unrelated to the delivery of merchandise, and the request to Claimant was prompted by that relationship.

The Exchange had very little, if any, control over Claimant and the task he was requested to perform. The Exchange merely designated the destination for the tires,

without specifying the route, and gave no instructions as to the method or manner of operating the vehicle, which was owned and furnished by Kei Motors. The Exchange was interested only in the end result.

While the tires were being transported for the Exchange, it is clear that Claimant would have returned to Tokyo that evening anyway as part of his normal duties for Kei Motors. Claimant testified that he would have returned by air. However, he notified his Tokyo office that he would be driving back, and his claim to Kei Motors for payment reflects that he was injured "while I was on TDY for the company." The contract claim of Kei Motors was to the same effect, which also demonstrate that Kei Motors did not terminate its relationship with Claimant. The Exchange had no right to fire him. (Emp. Exh. 5).

Claimant was not in the business of providing a delivery service. The record suggests that the Exchange was not a carrier either, and would have used an independent means of transporting the tires, military aircraft, had military aircraft been available that day. (Cl. Exh. 3, p. 13).

The evidence reflects that there was no specific method of payment agreed upon. The statement, "We'll take care of everything" is more consistent with reimbursement for expenses, plus a gratuity or payment for the completion of the single job, which is indicative of independent contractor status, rather than payment of wages.

Claimant points out that to undertake a journey comparable to a trip from New York to Chicago in bitter winter weather without expectation of reward is illogical and not compelling. I agree. However, this "expectation

of reward" does not create an employer-employee relationship. Under the facts of the case, the most logical and compelling finding is that Claimant was a gratuitous worker, a volunteer, who assisted another person, the Exchange, with a view in part to furthering either his own or his employer's interest, since he was a director and husband of the chief officer of a company which had other business relationships with the Exchange. See *Larson, Workmen's Compensation*, Vol. 1, Section 47.41(c). An analysis of the above factors listed above also leads to the conclusion that if any relationship existed between Claimant and the Exchange other than a simple business accommodation or favor by Claimant, it was one of independent contractor status.

Upon the basis of the foregoing findings of fact and conclusions of law, I enter the following

ORDER

The claim of Richard G. Symanowicz is DENIED.

/s/ GARVIN LEE OLIVER
Administrative Law Judge

Dated: 26 Mar 1979
Washington, D.C.

APPENDIX D

Order Denying Petition for Rehearing En Banc

(June 28, 1982)

No. 81-1075

UNITED STATES COURT OF APPEALS
FOR THE SEVENTH CIRCUIT

Before

HON. WILBUR F. PELL, JR., *Circuit Judge*
HON. HOWARD T. MARKEY, *Chief Judge**
HON. ROBERT A. SPRECHER, *Circuit Judge***

RICHARD G. SYMANOWICZ,
Petitioner,

vs.

ARMY AND AIR FORCE EXCHANGE SERVICE,

and

EMPLOYERS INSURANCE OF WAUSAU,

and

DIRECTOR, OFFICE OF WORKERS' COMPENSATION PROGRAMS, UNITED STATES DEPARTMENT OF LABOR,
Respondents.

ON PETITION FOR REVIEW OF AN ORDER OF THE BENEFITS REVIEW BOARD

On consideration of the petition for rehearing and suggestion for rehearing *en banc* filed in the above-entitled

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*Howard T. Markey, Chief Judge of the United States Court of Customs and Patent Appeals, is sitting by designation.

**Judge Sprecher died before he could act on this petition.

cause by Richard G. Symanowicz, petitioner, no judge in active service has requested a vote thereon, and all of the judges on the original panel have voted to deny a rehearing. Accordingly,

IT IS ORDERED that the aforesaid petition for rehearing be, and the same is hereby, DENIED.

APPENDIX E

TREATY OF MUTUAL COOPERATION AND SECURITY

between

THE UNITED STATES OF AMERICA AND JAPAN

and

STATUS OF FORCES AGREEMENT

with

RELATED DOCUMENTS HEADQUARTERS UNITED STATES FORCES, JAPAN

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*Original page numbers of Treaty can be found in bold brackets of text.

[1] TREATY OF MUTUAL COOPERATION AND SECURITY BETWEEN THE UNITED STATES OF AMERICA AND JAPAN

The United States of America and Japan,

Desiring to strengthen the bonds of peace and friendship traditionally existing between them, and to uphold the principles of democracy, individual liberty, and the rule of law,

Desiring further to encourage closer economic cooperation between them and to promote conditions of economic stability and well-being in their countries,

Reaffiriming their faith in the purposes and principles of the Charter of the United Nations, and their desire to live in peace with all peoples and all governments,

Recognizing that they have the inherent right of individual or collective self-defense as affirmed in the Charter of the United Nations,

Considering that they have a common concern in the maintenance of international peace and security in the Far East,

Having resolved to conclude a treaty of mutual cooperation and security,

Therefore agree as follows:

ARTICLE I

The Parties undertake, as set forth in the Charter of the United Nations, to settle any international disputes in which they may be involved by peaceful means in such a manner that international peace and security and justice are not endangered and to refrain in their international

relations from the threat or use of force against the territorial integrity or political independence of any state, or in any other manner inconsistent with the purposes of the United Nations.

The Parties will endeavor in concert with other peace-loving countries to strengthen the United Nations so that its mission of maintaining international peace and security may be discharged more effectively.

ARTICLE II

The Parties will contribute toward the further development of peaceful and friendly international relations by strengthening their free institutions, by bringing about a better understanding of the principles upon which these institutions are founded, and by promoting conditions of stability and well being. They will seek to eliminate conflict in their international economic policies and will encourage economic collaboration between them.

ARTICLE III

The Parties, individually and in cooperation with each other, by means of continuous and effective self-help and mutual aid will maintain and develop, subject to their constitutional provisions, their capacities to resist armed attack.

ARTICLE IV

The Parties will consult together from time to time regarding the implementation of this Treaty, and, at the request of either [2] Party, whenever the security of Japan or international peace and security in the Far East is threatened.

ARTICLE V

Each Party recognizes that an armed attack against either Party in the territories under the administration of Japan would be dangerous to its own peace and safety and declares that it would act to meet the common danger in accordance with its constitutional provisions and processes.

Any such armed attack and all measures taken as a result thereof shall be immediately reported to the Security Council of the United Nations in accordance with the provisions of Article 51 of the Charter. Such measures shall be terminated when the Security Council has taken the measures necessary to restore and maintain international peace and security.

ARTICLE VI

For the purpose of contributing to the security of Japan and the maintenance of international peace and security in the Far East, the United States of America is granted the use by its land, air and naval forces of facilities and areas in Japan.

The use of these facilities and areas as well as the status of United States armed forces in Japan shall be governed by a separate agreement, replacing the Administrative Agreement under Article III of the Security Treaty between the United States of America and Japan, signed at Tokyo on February 28, 1952, as amended, and by such other arrangements as may be agreed upon.

ARTICLE VII

This Treaty does not affect and shall not be interpreted as affecting in any way the rights and obligations of the

Parties under the Charter of the United Nations or the responsibility of the United Nations for the maintenance of international peace and security.

ARTICLE VIII

This Treaty shall be ratified by the United States of America and Japan in accordance with their respective constitutional processes and will enter into force on the date on which the instruments of ratification thereof have been exchanged by them in Tokyo.

ARTICLE IX

The Security Treaty between the United States of America and Japan signed at the city of San Francisco on September 8, 1951 shall expire upon the entering into force of this Treaty.

ARTICLE X

This Treaty shall remain in force until in the opinion of the Governments of the United States of America and Japan there shall have come into force such United Nations arrangements as will satisfactorily provide for the maintenance of international peace and security in the Japan area.

However, after the Treaty has been in force for ten years, either Party may give notice to the other Party of its intention to terminate the Treaty, in which case the Treaty shall terminate one year after such notice has been given.

IN WITNESS WHEREOF the undersigned Plenipotentiaries have signed this Treaty.

DONE in duplicate at Washington in the English and Japanese languages, both equally authentic, this 19th day of January, 1960.

FOR THE UNITED STATES OF AMERICA:

Christian A. Herter
Douglas MacArthur II

FOR JAPAN:

Nobusuke Kishi
Aiichiro Fujiyama

[3] AGREED MINUTE TO THE TREATY OF MUTUAL COOPERATION AND SECURITY

Japanese Plenipotentiary:

While the question of the status of the islands administered by the United States under Article 3 of the Treaty of Peace with Japan has not been made a subject of discussion in the course of treaty negotiations, I would like to emphasize the strong concern of the Government and people of Japan for the safety of the people of these islands since Japan possesses residual sovereignty over these islands. If an armed attack occurs or is threatened against these islands, the two countries will of course consult together closely under Article IV of the Treaty of Mutual Cooperation and Security. In the event of an armed attack, it is the intention of the Government of Japan to explore with the United States measures which it might be able to take for the welfare of the islanders.

United States Plenipotentiary:

In the event of an armed attack against these islands, the United States Government will consult at once with the Government of Japan and intends to take the necessary measures for the defense of these islands, and to do its utmost to secure the welfare of the islanders.

Washington, January 19, 1960.

[4] AGREEMENT UNDER ARTICLE VI OF THE TREATY OF MUTUAL COOPERATION AND SECURITY BETWEEN THE UNITED STATES OF AMERICA AND JAPAN, REGARDING FACILITIES AND AREAS AND THE STATUS OF UNITED STATES ARMED FORCES IN JAPAN

The United States of America and Japan, pursuant to Article VI of the Treaty of Mutual Cooperation and Security between the United States of America and Japan signed at Washington on January 19, 1960, have entered into this Agreement in terms as set forth below:

ARTICLE I

In this Agreement the expression—

(a) "members of the United States armed forces" means the personnel on active duty belonging to the land, sea or air armed services of the United States of America when in the territory of Japan.

(b) "civilian component" means the civilian persons of the United States nationality who are in the employ of, serving with, or accompanying the United States armed forces in Japan, but excludes persons who are ordinarily resident in Japan or who are mentioned in paragraph 1 of Article XIV. For the purposes of this Agreement only, dual nationals, United States and Japanese, who are brought to Japan by the United States shall be considered as United States nationals.

(c) "dependents" means

(1) Spouse, and children under 21;

(2) Parents, and children over 21, if dependent for over half their support upon a member of the United States armed forces or civilian component.

ARTICLE II

1. (a) The United States is granted, under Article VI of the Treaty of Mutual Cooperation and Security, the use of facilities and areas in Japan. Agreements as to specific facilities and areas shall be concluded by the two Governments through the Joint Committee provided for in Article XXV of this Agreement. "Facilities and areas" include existing furnishings, equipment and fixtures necessary to the operation of such facilities and areas.

(b) The facilities and areas of which the United States has the use at the time of expiration of the Administrative Agreement under Article III of the Security Treaty between the United States of America and Japan, shall be considered as facilities and areas agreed upon between the two Governments in accordance with the subparagraph (a) above.

2. At the request of either Government, the Governments of the United States and Japan shall review such arrangements and may agree that such facilities and areas shall be returned to Japan or that additional facilities and areas may be provided.

3. The facilities and areas used by the United States armed forces shall be returned to Japan whenever they are no longer needed for purposes of this Agreement, and the United States agrees to keep the needs for facilities and areas under continual observation with a view toward such return.

4. (a) When facilities and areas are temporarily not being used by the United States armed forces, the Government of Japan may make, or permit Japanese nationals to make, interim use of such facilities and areas provided that it is agreed between the two [5] Govern-

ments through the Joint Committee that such use would not be harmful to the purposes for which the facilities and areas are normally used by the United States armed forces.

(b) With respect to facilities and areas which are to be used by United States armed forces for limited periods of time, the Joint Committee shall specify in the agreements covering such facilities and areas the extent to which the provisions of this Agreement shall apply.

ARTICLE III

1. Within the facilities and areas, the United States may take all the measures necessary for their establishment, operation, safeguarding and control. In order to provide access for the United States armed forces to the facilities and areas for their support, safeguarding and control, the Government of Japan shall, at the request of the United States armed forces and upon consultation between the two Governments through the Joint Committee, take necessary measures within the scope of applicable laws and regulations over land, territorial waters and airspace adjacent to, or in the vicinities of the facilities and areas. The United States may also take necessary measures for such purposes upon consultation between the two Governments through the Joint Committee.

2. The United States agrees not to take the measures referred to in paragraph 1 in such a manner as to interfere unnecessarily with navigation, aviation, communication, or land travel to or from or within the territories of Japan. All questions relating to frequencies, power and like matters used by apparatus employed by the United States designed to emit electric radiation shall be settled by arrangement between the appropriate authorities of the two Governments. The Government of Japan shall, within the

scope of applicable laws and regulations, take all reasonable measures to avoid or eliminate interference with telecommunications electronics required by the United States armed forces.

3. Operations in the facilities and areas in use by the United States armed forces shall be carried on with due regard for the public safety.

ARTICLE IV

1. The United States is not obliged, when it returns facilities and areas to Japan on the expiration of this Agreement or at an earlier date, to restore the facilities and areas to the condition in which they were at the time they became available to the United States armed forces, or to compensate Japan in lieu of such restoration.

2. Japan is not obliged to make any compensation to the United States for any improvements made in the facilities and areas or for the buildings or structures left thereon on the expiration of this Agreement or the earlier return of the facilities and areas.

3. The foregoing provisions shall not apply to any construction which the Governemnt of the United States may undertake under special arrangements with the Government of Japan.

ARTICLE V

1. United States and foreign vessels and aircraft operated by, for, or under the control of the United States for official purposes shall be accorded access to any port or airport of Japan free from toll or landing charges. When cargo or passengers not accorded the exemptions of this Agreement are carried on such vessels and aircraft notification shall be given to the appropriate Japanese au-

thorities, and their entry into and departure from Japan shall be according to the laws and regulations of Japan.

2. The vessels and aircraft mentioned in paragraph 1, United States Government-owned vehicles including armor, and members of the United States armed forces, the civilian component, and their dependents shall be accorded access to and movement [6] between facilities and areas in use by the United States armed forces and between such facilities and areas and the ports or airports of Japan. Such access to and movement between facilities and areas by United States military vehicles shall be free from toll and other charges.

3. When the vessels mentioned in paragraph 1 enter Japanese ports, appropriate notification shall, under normal conditions, be made to the proper Japanese authorities. Such vessels shall have freedom from compulsory pilotage, but if a pilot is taken pilotage shall be paid for at appropriate rates.

ARTICLE VI

1. All civil and military air traffic control and communications systems shall be developed in close coordination and shall be integrated to the extent necessary for fulfillment of collective security interests. Procedures, and any subsequent changes thereto, necessary to effect this coordination and integration will be established by arrangement between the appropriate authorities of the two Governments.

2. Lights and other aids to navigation of vessels and aircraft placed or established in the facilities and areas in use by United States armed forces and in territorial waters adjacent thereto or in the vicinity thereof shall conform to the system in use in Japan. The United States and

Japanese authorities which have established such navigation aids shall notify each other of their positions and characteristics and shall give advance notification before making any changes in them or establishing additional navigation aids.

ARTICLE VII

The United States armed forces shall have the use of all public utilities and services belonging to, or controlled or regulated by the Government of Japan, and shall enjoy priorities in such use, under conditions no less favorable than those that may be applicable from time to time to the ministries and agencies of the Government of Japan.

ARTICLE VIII

The Government of Japan undertakes to furnish the United States armed forces with the following meteorological services in accordance with arrangements between the appropriate authorities of the two Governments:

(a) Meteorological observations from land and ocean areas including observations from weather ships.

(b) Climatological information including periodic summaries and the historical data of the Meteorological Agency.

(c) Telecommunications service to disseminate meteorological information required for the safe and regular operation of aircraft.

(d) Seismographic data including forecasts of the estimated size of tidal waves resulting from earthquakes and areas that might be affected thereby.

ARTICLE IX

1. The United States may bring into Japan persons who are members of the United States armed forces, the civilian component, and their dependents, subject to the provisions of this Article.

2. Members of the United States armed forces shall be exempt from Japanese passport and visa laws and regulations. Members of the United States armed forces, the civilian component, and their dependents shall be exempt from Japanese laws and regulations on the registration and control of aliens, but shall not be considered as acquiring any right to permanent residence or domicile in the territories of Japan.

3. Upon entry into or departure from Japan members of the United States armed forces shall be in possession of the following documents:

(a) Personal identity card showing name, date of birth, rank and number, service, and photograph; and

[7] (b) individual or collective travel order certifying to the status of the individual or group as a member or members of the United States armed forces and to the travel ordered.

For purposes of their identification while in Japan, members of the United States armed forces shall be in possession of the foregoing personal identity card which must be presented on request to the appropriate Japanese authorities.

4. Members of the civilian component, their dependents, and the dependents of members of the United States armed forces shall be in possession of appropriate documentation issued by the United States authorities so that their status may be verified by Japanese authorities upon

their entry into or departure from Japan, or while in Japan.

5. If the status of any person brought into Japan under paragraph 1 of this Article is altered so that he would no longer be entitled to such admission, the United States authorities shall notify the Japanese authorities and shall, if such person be required by the Japanese authorities to leave Japan, assure that transportation from Japan will be provided within a reasonable time at no cost to the Government of Japan.

6. If the Government of Japan has requested the removal from its territory of a member of the United States armed forces or civilian component or has made an expulsion order against an ex-member of the United States armed forces or the civilian component or against a dependent of a member or ex-member, the authorities of the United States shall be responsible for receiving the person concerned within its own territory or otherwise disposing of him outside Japan. This paragraph shall apply only to persons who are not nationals of Japan and have entered Japan as members of the United States armed forces or civilian component or for the purpose of becoming such members, and to the dependents of such persons.

ARTICLE X

1. Japan shall accept as valid, without a driving test or fee, the driving permit or license or military driving permit issued by the United States to a member of the United States armed forces, the civilian component, and their dependents.

2. Official vehicles of the United States armed forces and the civilian component shall carry distinctive numbered plates or individual markings which will readily identify them.

3. Privately owned vehicles of members of the United States armed forces, the civilian component, and their dependents shall carry Japanese number plates to be acquired under the same conditions as those applicable to Japanese nationals.

ARTICLE XI

1. Save as provided in this Agreement, members of the United States armed forces, the civilian component, and their dependents shall be subject to the laws and regulations administered by the customs authorities of Japan.

2. All materials, supplies and equipment imported by the United States armed forces, the authorized procurement agencies of the United States armed forces, or by the organizations provided for in Article XV, for the official use of the United States armed forces or for the use of the members of the United States armed forces, the civilian component, and their dependents, and materials, supplies and equipment which are to be used exclusively by the United States armed forces or are ultimately to be incorporated into articles or facilities used by such forces, shall be permitted entry into Japan; such entry shall be free from customs duties and other such charges. Appropriate certification shall be made that such materials, supplies and equipment are being imported by the United States armed forces, the authorized procurement agencies of the United States armed forces, or by the organizations provided for [8] in Article XV, or, in the case of materials, supplies and equipment to be used exclusively by the United States armed forces or ultimately to be incorporated into articles or facilities used by such forces, that delivery thereof is to be taken by the United States armed forces for the purposes specified above.

3. Property consigned to and for the personal use of members of the United States armed forces, the civilian component, and their dependents, shall be subject to customs duties and other such charges, except that no duties or charges shall be paid with respect to:

(a) Furniture and household goods for their private use imported by the members of the United States armed forces or civilian component when they first arrive to serve in Japan or by their dependents when they first arrive for reunion with members of such forces or civilian component, and personal effects for private use brought by the said persons upon entrance.

(b) Vehicles and parts imported by members of the United States armed forces or civilian component for the private use of themselves or their dependents.

(c) Reasonable quantities of clothing and household goods of a type which would ordinarily be purchased in the United States for everyday use for the private use of members of the United States armed forces, civilian component, and their dependents, which are mailed into Japan through United States military post offices.

4. The exemptions granted in paragraphs 2 and 3 shall apply only to cases of importation of goods and shall not be interpreted as refunding customs duties and domestic excises collected by the customs authorities at the time of entry in cases of purchases of goods on which such duties and excises have already been collected.

5. Customs examination shall not be made in the following cases:

(a) Units of the United States armed forces under orders entering or leaving Japan;

(b) Official documents under official seal and official mail in United States military postal channels;

(c) Military cargo shipped on a United States Government bill of lading.

6. Except as such disposal may be authorized by the United States and Japanese authorities in accordance with mutually agreed conditions, goods imported into Japan free of duty shall not be disposed of in Japan to persons not entitled to import such goods free of duty.

7. Goods imported into Japan free from customs duties and other such charges pursuant to paragraphs 2 and 3, may be re-exported free from customs duties and other such charges.

8. The United States armed forces, in cooperation with Japanese authorities, shall take such steps as are necessary to prevent abuse of privileges granted to the United States armed forces, members of such forces, the civilian component, and their dependents in accordance with this Article.

9. (a) In order to prevent offenses against laws and regulations administered by the customs authorities of the Government of Japan, the Japanese authorities and the United States armed forces shall assist each other in the conduct of inquiries and the collection of evidence.

(b) The United States armed forces shall render all assistance within their power to ensure that articles liable to seizure by, or on behalf of, the customs authorities of the Government of Japan are handed to those authorities.

(c) The United States armed forces shall render all assistance within their power to ensure the payment of duties, taxes, and penalties payable by members of such forces or of the civilian component, or their dependents.

[9] (d) Vehicles and articles belonging to the United States armed forces seized by the customs authorities of the Government of Japan in connection with an offense against its customs or fiscal laws or regulations shall be handed over to the appropriate authorities of the force concerned.

ARTICLE XII

1. The United States may contract for any supplies or construction work to be furnished or undertaken in Japan for purposes of, or authorized by, this Agreement, without restriction as to choice of supplier or person who does the construction work. Such supplies or construction work may, upon agreement between the appropriate authorities of the two Governments, also be procured through the Government of Japan.

2. Materials, supplies, equipment and services which are required from local sources for the maintenance of the United States armed forces and the procurement of which may have an adverse effect on the economy of Japan shall be procured in coordination with, and, when desirable, through or with the assistance of, the competent authorities of Japan.

3. Materials, supplies, equipment and services procured for official purposes in Japan by the United States armed forces, or by authorized procurement agencies of the United States armed forces upon appropriate certification shall be exempt from the following Japanese taxes:

(a) Commodity tax

(b) Travelling tax

(c) Gasoline tax

(d) Electricity and gas tax

Materials, supplies, equipment and services procured for ultimate use by the United States armed forces shall be exempt from commodity and gasoline taxes upon appropriate certification by the United States armed forces. With respect to any present or future Japanese taxes not specifically referred to in this Article which might be found to constitute a significant and readily identifiable part of the gross purchase price of materials, supplies, equipment and services procured by the United States armed forces, or for ultimate use by such forces, the two Governments will agree upon a procedure for granting such exemption or relief therefrom as is consistent with the purposes of this Article.

4. Local labor requirements of United States armed forces and of the organizations provided for in Article XV shall be satisfied with the assistance of the Japanese authorities.

5. The obligations for the withholding and payment of income tax, local inhabitant tax and social security contributions, and, except as may otherwise be mutually agreed, the conditions of employment and work, such as those relating to wages and supplementary payments, the conditions for the protection of workers, and the rights of workers concerning labor relations shall be those laid down by the legislation of Japan.

6. Should the United States armed forces or as appropriate an organization provided for in Article XV dismiss a worker and a decision of a court or a Labor Relations Commission of Japan to the effect that the contract of employment has not terminated become final, the following procedures shall apply:

(a) The United States armed forces or the said organization shall be informed by the Government of Japan of the decision of the court or Commission;

(b) Should the United States armed forces or the said organization not desire to return the worker to duty, they shall so notify the Government of Japan within seven days after being informed by the latter of the decision of the court or Commission, and may temporarily withhold the worker from duty;

[10] (c) Upon such notification, the Government of Japan and the United States armed forces or the said organization shall consult together without delay with a view to finding a practical solution of the case;

(d) Should such a solution not be reached within a period of thirty days from the date of commencement of the consultations under (c) above, the worker will not be entitled to return to duty. In such case, the Government of the United States shall pay to the Government of Japan an amount equal to the cost of employment of the worker for a period of time to be agreed between the two Governments.

7. Members of the civilian component shall not be subject to Japanese laws or regulations with respect to terms and conditions of employment.

8. Neither members of the United States armed forces, civilian component, nor their dependents, shall by reason of this Article enjoy any exemption from taxes or similar charges relating to personal purchases of goods and services in Japan chargeable under Japanese legislation.

9. Except as such disposal may be authorized by the United States and Japanese authorities in accordance with mutually agreed conditions, goods purchased in Japan exempt from the taxes referred to in paragraph 3, shall not be disposed of in Japan to persons not entitled to purchase such goods exempt from such tax.

ARTICLE XIII

1. The United States armed forces shall not be subject to taxes or similar charges on property held, used or transferred by such forces in Japan.

2. Members of the United States armed forces, the civilian component, and their dependents shall not be liable to pay any Japanese taxes to the Government of Japan or to any other taxing agency in Japan on income received as a result of their service with or employment by the United States armed forces, or by the organizations provided for in Article XV. The provisions of this Article do not exempt such persons from payment of Japanese taxes on income derived from Japanese sources, nor do they exempt United States citizens who for United States income tax purposes claim Japanese residence from payment of Japanese taxes on income. Periods during which such persons are in Japan solely by reason of being members of the United States armed forces, the civilian component, or their dependents shall not be considered as periods of residence or domicile in Japan for the purpose of Japanese taxation.

3. Members of the United States armed forces, the civilian component, and their dependents shall be exempt from taxation in Japan on the holding, use, transfer *inter se*, or transfer by death of movable property, tangible or intangible, the presence of which in Japan is due solely to the temporary presence of these persons in Japan, provided that such exemption shall not apply to property held for the purpose of investment or the conduct of business in Japan or to any intangible property registered in Japan. There is no obligation under this Article to grant exemption from taxes payable in respect of the use of roads by private vehicles.

ARTICLE XIV

1. Persons, including corporations organized under the laws of the United States, and their employees who are ordinarily resident in the United States and whose presence in Japan is solely for the purpose of executing contracts with the United States for the benefit of the United States armed forces, and who are designated by the Government of the United States in accordance with the provisions of paragraph 2 below, shall, except as provided in this Article, be subject to the laws and regulations of Japan.

2. The designation referred to in paragraph 1 above shall be made upon consultation with the Government of Japan and shall [11] be restricted to cases where open competitive bidding is not practicable due to security considerations, to the technical qualifications of the contractors involved, or to the unavailability of materials or services required by United States standards, or to limitations of United States law.

The designation shall be withdrawn by the Government of the United States:

(a) upon completion of contracts with the United States for the United States armed forces;

(b) upon proof that such persons are engaged in business activities in Japan other than those pertaining to the United States armed forces; or

(c) when such persons are engaged in practices illegal in Japan.

3. Upon certification by appropriate United States authorities as to their identity, such persons and their employees shall be accorded the following benefits of this Agreement:

(a) Rights of accession and movement, as provided for in Article V, paragraph 2;

(b) Entry into Japan in accordance with the provisions of Article IX;

(c) The exemption from customs duties, and other such charges provided for in Article XI, paragraph 3, for members of the United States armed forces, the civilian component, and their dependents;

(d) If authorized by the Government of the United States the right to use the services of the organizations provided for in Article XV;

(e) Those provided for in Article XIX, paragraph 2, for members of the armed forces of the United States, the civilian component, and their dependents;

(f) If authorized by the Government of the United States, the right to use military payment certificates, as provided for in Article XX;

(g) The use of postal facilities provided for in Article XXI;

(h) Exemption from the laws and regulations of Japan with respect to terms and conditions of employment.

4. Such persons and their employees shall be so described in their passports and their arrival, departure and their residence while in Japan shall from time to time be notified by the United States armed forces to the Japanese authorities.

5. Upon certification by an authorized officer of the United States armed forces, depreciable assets except houses, held, used, or transferred, by such persons and their

employees exclusively for the execution of contracts referred to in paragraph 1 shall not be subject to taxes or similar charges of Japan.

6. Upon certification by an authorized officer of the United States armed forces, such persons and their employees shall be exempt from taxation in Japan on the holding, use, transfer by death, or transfer to persons or agencies entitled to tax exemption under this Agreement, of movable property, tangible or intangible, the presence of which in Japan is due solely to the temporary presence of these persons in Japan, provided that such exemption shall not apply to property held for the purpose of investment or the conduct of other business in Japan or to any intangible property registered in Japan. There is no obligation under this Article to grant exemption from taxes payable in respect of the use of roads by private vehicles.

7. The persons and their employees referred to in paragraph 1 shall not be liable to pay income or corporation taxes to the Government of Japan or to any other taxing agency in Japan on any income derived under a contract made in the United States with the Government of the United States in connection with the construction, maintenance or operation of any of the facilities or areas covered by this Agreement. The provisions of this paragraph do not exempt such persons from payment of income or corporation taxes on income derived from Japanese [12] sources, nor do they exempt such persons and their employees who, for United States income tax purposes, claim Japanese residence, from payment of Japanese taxes on income. Periods during which such persons are in Japan solely in connection with the execution of a contract with the Government of the United States shall not be con-

sidered periods of residence or domicile in Japan for the purposes of such taxation.

8. Japanese authorities shall have the primary right to exercise jurisdiction over the persons and their employees referred to in paragraph 1 of this Article in relation to offenses committed in Japan and punishable by the law of Japan. In those cases in which the Japanese authorities decide not to exercise such jurisdiction they shall notify the military authorities of the United States as soon as possible. Upon such notification the military authorities of the United States shall have the right to exercise such jurisdiction over the persons referred to as is conferred on them by the law of the United States.

ARTICLE XV

1. (a) Navy exchanges, post exchanges, messes, social clubs, theaters, newspapers and other non-appropriated fund organizations authorized and regulated by the United States military authorities may be established in the facilities and areas in use by the United States armed forces for the use of members of such forces, the civilian component, and their dependents. Except as otherwise provided in this Agreement, such organizations shall not be subject to Japanese regulations, license, fees, taxes or similar controls.

(b) When a newspaper authorized and regulated by the United States military authorities is sold to the general public, it shall be subject to Japanese regulations, license, fees, taxes or similar controls so far as such circulation is concerned.

2. No Japanese tax shall be imposed on sales of merchandise and services by such organizations, except as provided in paragraph 1 (b), but purchases within Japan

of merchandise and supplies by such organizations shall be subject to Japanese taxes.

3. Except as such disposal may be authorized by the United States and Japanese authorities in accordance with mutually agreed conditions, goods which are sold by such organizations shall not be disposed of in Japan to persons not authorized to make purchases from such organizations.

4. The organizations referred to in this Article shall provide such information to the Japanese authorities as is required by Japanese tax legislation.

ARTICLE XVI

It is the duty of members of the United States armed forces, the civilian component, and their dependents to respect the law of Japan and to abstain from any activity inconsistent with the spirit of this Agreement, and, in particular, from any political activity in Japan.

ARTICLE XVII

1. Subject to the provisions of this Article,

(a) the military authorities of the United States shall have the right to exercise within Japan all criminal and disciplinary jurisdiction conferred on them by the law of the United States over all persons subject to the military law of the United States;

(b) the authorities of Japan shall have jurisdiction over the members of the United States armed forces, the civilian component, and their dependents with respect to offenses committed within the territory of Japan and punishable by the law of Japan.

2. (a) The military authorities of the United States shall have the right to exercise exclusive jurisdiction over

persons subject to the military law of the United States with respect to offenses, including offenses relating to its security, punishable by the law of the United States, but not by the law of Japan.

[13] (b) The authorities of Japan shall have the right to exercise exclusive jurisdiction over members of the United States armed forces, the civilian component, and their dependents with respect to offenses, including offenses relating to the security of Japan, punishable by its law but not by the law of the United States.

(c) For the purposes of this paragraph and of paragraph 3 of this Article a security offense against a State shall include

(i) treason against the State;

(ii) sabotage, espionage or violation of any law relating to official secrets of that State, or secrets relating to the national defense of that State.

3. In cases where the right to exercise jurisdiction is concurrent the following rules shall apply:

(a) The military authorities of the United States shall have the primary right to exercise jurisdiction over members of the United States armed forces or the civilian component in relation to

(i) offenses solely against the property or security of the United States, or offenses solely against the person or property of another member of the United States armed forces or the civilian component or of a dependent;

(ii) offenses arising out of any act or omission done in the performance of official duty.

(b) In the case of any other offense the authorities of Japan shall have the primary right to exercise jurisdiction.

(c) If the State having the primary right decides not to exercise jurisdiction, it shall notify the authorities of the other State as soon as practicable. The authorities of the State having the primary right shall give sympathetic consideration to a request from the authorities of the other State for a waiver of its right in cases where that other State considers such waiver to be of particular importance.

4. The foregoing provisions of this Article shall not imply any right for the military authorities of the United State to exercise jurisdiction over persons who are nationals of or ordinarily resident in Japan, unless they are members of the United States armed forces.

5. (a) The military authorities of the United States and the authorities of Japan shall assist each other in the arrest of members of the United States armed forces, the civilian component, or their dependents in the territory of Japan and in handing them over to the authority which is to exercise jurisdiction in accordance with the above provision.

(b) The authorities of Japan shall notify promptly the military authorities of the United States of the arrest of any member of the United States armed forces, the civilian component, or a dependent.

(c) The custody of an accused member of the United States armed forces or the civilian component over whom Japan is to exercise jurisdiction shall, if he is in the hands of the United States, remain with the United States until he is charged by Japan.

6. (a) The military authorities of the United States and the authorities of Japan shall assist each other in the carrying out of all necessary investigations into offenses, and in the collection and production of evidence, including the seizure and, in proper cases, the handing over of objects connected with an offense. The handing over of such objects may, however, be made subject to their return within the time specified by the authority delivering them.

(b) The military authorities of the United States and the authorities of Japan shall notify each other of the disposition of all cases in which there are concurrent rights to exercise jurisdiction.

[14] 7. (a) A death sentence shall not be carried out in Japan by the military authorities of the United States if the legislation of Japan does not provide for such punishment in a similar case.

(b) The authorities of Japan shall give sympathetic consideration to a request from the military authorities of the United States for assistance in carrying out a sentence of imprisonment pronounced by the military authorities of the United States under the provisions of this Article within the territory of Japan.

8. Where an accused has been tried in accordance with the provisions of this Article either by the military authorities of the United States or the authorities of Japan and has been acquitted, or has been convicted and is serving, or has served, his sentence or has been pardoned, he may not be tried again for the same offense within the territory of Japan by the authorities of the other State. However, nothing in this paragraph shall prevent the military authorities of the United States from trying a member of its armed forces for any violation of rules

of discipline arising from an act or omission which constituted an offense for which he was tried by the authorities of Japan.

9. Whenever a member of the United States armed forces, the civilian component or a dependent is prosecuted under the jurisdiction of Japan he shall be entitled:

(a) to a prompt and speedy trial;

(b) to be informed, in advance of trial, of the specific charge or charges made against him;

(c) to be confronted with the witnesses against him;

(d) to have compulsory process for obtaining witnesses in his favor, if they are within the jurisdiction of Japan;

(e) to have legal representation of his own choice for his defense or to have free or assisted legal representation under the conditions prevailing for the time being in Japan;

(f) if he considers it necessary, to have the services of a competent interpreter; and

(g) to communicate with a representative of the Government of the United States and to have such a representative present at his trial.

10. (a) Regularly constituted military units or formations of the United States armed forces shall have the right to police any facilities or areas which they use under Article II of this Agreement. The military police of such forces may take all appropriate measures to ensure the maintenance of order and security within such facilities and areas.

(b) Outside these facilities and areas, such military police shall be employed only subject to arrangements with the authorities of Japan and in liaison with those authorities and in so far as such employment is necessary to maintain discipline and order among the members of the United States armed forces.

11. In the event of hostilities to which the provisions of Article V of the Treaty of Mutual Cooperation and Security apply, either the Government of the United States or the Government of Japan shall have the right by giving sixty days' notice to the other, to suspend the application of any of the provisions of this Article. If this right is exercised, the Governments of the United States and Japan shall immediately consult with a view to agreeing on suitable provisions to replace the provisions suspended.

12. The provisions of this Article shall not apply to any offenses committed before the entry into force of this Agreement. Such cases shall be governed by the provisions of Article XVII of the Administrative Agreement under Article III of the Security Treaty between the United States of America and Japan, as it existed at the relevant time.

ARTICLE XVIII

1. Each Party waives all its claims against the other Party for damage to any property [15] owned by it and used by its land, sea or air defense services, if such damage—

(a) was caused by a member or an employee of the defense services of the other Party in the performance of his official duties; or

(b) arose from the use of any vehicle, vessel or aircraft owned by the other Party and used by its defense

services, provided either that the vehicle, vessel or aircraft causing the damage was being used for official purposes, or that the damage was caused to property being so used.

Claims for maritime salvage by one Party against the other Party shall be waived, provided that the vessel or cargo salved was owned by a Party and being used by its defense services for official purposes.

2. (a) In the case of damage caused or arising as stated in paragraph 1 to other property owned by either Party and located in Japan, the issue of the liability of the other Party shall be determined and the amount of damage shall be assessed, unless the two Governments agree otherwise, by a sole arbitrator selected in accordance with subparagraph (b) of this paragraph. The arbitrator shall also decide any counterclaims arising out of the same incident.

(b) The arbitrator referred to in subparagraph (a) above shall be selected by agreement between the two Governments from amongst the nationals of Japan who hold or have held high judicial office.

(c) Any decision taken by the arbitrator shall be binding and conclusive upon the Parties.

(d) The amount of any compensation awarded by the arbitrator shall be distributed in accordance with the provisions of paragraph 5(e)(i), (ii) and (iii) of this Article.

(e) The compensation of the arbitrator shall be fixed by agreement between the two Governments and shall, together with the necessary expenses incidental to the performance of his duties, be defrayed in equal proportions by them.

(f) Nevertheless, each Party waives its claim in any such case up to the amount of 1,400 United States dollars or 504,000 yen. In the case of considerable variation in the rate of exchange between these currencies the two Governments shall agree on the appropriate adjustments of these amounts.

3. For the purposes of paragraphs 1 and 2 of this Article the expression "owned by a Party" in the case of a vessel includes a vessel on bare boat charter to that Party or requisitioned by it on bare boat terms or seized by it in prize (except to the extent that the risk of loss or liability is borne by some person other than such Party).

4. Each Party waives all its claims against the other Party for injury or death suffered by any member of its defense services while such member was engaged in the performance of his official duties.

5. Claims (other than contractual claims and those to which paragraphs 6 or 7 of this Article apply) arising out of acts or omissions of members or employees of the United States armed forces done in the performance of official duty, or out of any other act, omission or occurrence for which the United States armed forces are legally responsible, and causing damage in Japan to third parties, other than the Government of Japan, shall be dealt with by Japan in accordance with the following provisions:

(a) Claims shall be filed, considered and settled or adjudicated in accordance with the laws and regulations of Japan with respect to claims arising from the activities of its Self-Defense Forces.

(b) Japan may settle any such claims, and payment of the amount agreed upon or determined by adjudication shall be made by Japan in yen.

(c) Such payment, whether made pursuant to a settlement or to adjudication of [16] the case by a competent tribunal of Japan, or the final adjudication by such a tribunal denying payment, shall be binding and conclusive upon the Parties.

(d) Every claim paid by Japan shall be communicated to the appropriate United States authorities together with full particulars and a proposed distribution in conformity with subparagraphs (e) (i) and (ii) below. In default of a reply within two months, the proposed distribution shall be regarded as accepted.

(e) The cost incurred in satisfying claims pursuant to the preceding subparagraphs and paragraph 2 of this Article shall be distributed between the Parties as follows:

(i) Where the United States alone is responsible, the amount awarded or adjudged shall be distributed in the proportion of 25 percent chargeable to Japan and 75 percent chargeable to the United States.

(ii) Where the United States and Japan are responsible for the damage, the amount awarded or adjudged shall be distributed equally between them. Where the damage was caused by the defense services of the United States or Japan and it is not possible to attribute it specifically to one or both of those defense services, the amount awarded or adjudged shall be distributed equally between the United States and Japan.

(iii) Every half-year, a statement of the sums paid by Japan in the course of the half-yearly period in respect of every case regarding which the proposed distribution on a percentage basis has been accepted, shall be sent to the appropriate United States authorities, together with a request for reimbursement. Such reimbursement shall be made, in yen, within the shortest possible time.

(f) Members or employees of the United States armed forces, excluding those employees who have only Japanese nationality, shall not be subject to any proceedings for the enforcement of any judgment given against them in Japan in a matter arising from the performance of their official duties.

(g) Except insofar as subparagraph (e) of this paragraph applies to claims covered by paragraph 2 of this Article, the provisions of this paragraph shall not apply to any claim arising out of or in connection with the navigation or operation of a ship or the loading, carriage, or discharge of a cargo, other than claims for death or personal injury to which paragraph 4 of this Article does not apply.

6. Claims against members or employees of the United States armed forces (except employees who are nationals of or ordinarily resident in Japan) arising out of tortious acts or omissions in Japan not done in the performance of official duty shall be dealt with in the following manner:

(a) The authorities of Japan shall consider the claim and assess compensation to the claimant in a fair and just manner, taking into account all the circumstances of

the case, including the conduct of the injured person, and shall prepare a report on the matter.

(b) The report shall be delivered to the appropriate United States authorities, who shall then decide without delay whether they will offer an *ex gratia* payment, and if so, of what amount.

(c) If an offer of *ex gratia* payment is made, and accepted by the claimant in full satisfaction of his claim, the United States authorities shall make the payment themselves and inform the authorities of Japan of their decision and of the sum paid.

(d) Nothing in this paragraph shall affect the jurisdiction of the courts of Japan to [17] entertain an action against a member or an employee of the United States armed forces unless and until there has been payment in full satisfaction of the claim.

7. Claims arising out of the unauthorized use of any vehicle of the United States armed forces shall be dealt with in accordance with paragraph 6 of this Article, except in so far as the United States armed forces are legally responsible.

8. If a dispute arises as to whether a tortious act or omission of a member of an employee of the United States armed forces was done in the performance of official duty or as to whether the use of any vehicle of the United States armed forces was unauthorized, the question shall be submitted to an arbitrator appointed in accordance with paragraph 2(b) of this Article, whose decision on this point shall be final and conclusive.

9. (a) The United States shall not claim immunity from the jurisdiction of the courts of Japan for members or employees of the United States armed forces in respect

of the civil jurisdiction of the courts of Japan except to the extent provided in paragraph 5 (f) of this Article.

(b) In case any private movable property, excluding that in use by the United States armed forces, which is subject to compulsory execution under Japanese law is within the facilities and areas in use by the United States armed forces, the United States authorities shall, upon the request of Japanese courts, possess and turn over such property to the Japanese authorities.

(c) The authorities of the United States and Japan shall cooperate in the procurement of evidence for a fair hearing and disposal of claims under this Article.

10. Disputes arising out of contracts concerning the procurement of materials, supplies, equipment, services and labor by or for the United States armed forces, which are not resolved by the parties to the contract concerned, may be submitted to the Joint Committee for conciliation, provided that the provisions of this paragraph shall not prejudice any right which the parties to the contract may have to file a civil suit.

11. The term "defense services" used in this Article is understood to mean for Japan its Self-Defense Forces and for the United States its armed forces.

12. Paragraphs 2 and 5 of this Article shall apply only to claims arising incident to non-combat activities.

13. The provisions of this Article shall not apply to any claims which arose before the entry into force of this Agreement. Such claims shall be dealt with by the provisions of Article XVIII of the Administrative Agreement under Article III of the Security Treaty between the United States of America and Japan.

ARTICLE XIX

1. Members of the United States armed forces, the civilian component, and their dependents, shall be subject to the foreign exchange controls of the Government of Japan.

2. The preceding paragraph shall not be construed to preclude the transmission into or outside of Japan of United States dollars or dollar instruments representing the official funds of the United States or realized as a result of service or employment in connection with this Agreement by members of the United States armed forces and the civilian component, or realized by such persons and their dependents from sources outside of Japan.

3. The United States authorities shall take suitable measures to preclude the abuse of the privileges stipulated in the preceding paragraph or circumvention of the Japanese foreign exchange controls.

ARTICLE XX

1. (a) United States military payment certificates denominated in dollars may be [18] used by persons authorized by the United States for internal transactions within the facilities and areas in use by the United States armed forces. The Government of the United States will take appropriate action to insure that authorized personnel are prohibited from engaging in transactions involving military payment certificates except as authorized by United States regulations. The Government of Japan will take necessary action to prohibit unauthorized persons from engaging in transactions involving military payment certificates and with the aid of United States authorities will undertake to apprehend and punish any person or persons

under its jurisdiction involved in the counterfeiting or uttering of counterfeit military payment certificates.

(b) It is agreed that the United States authorities will apprehend and punish members of the United States armed forces, the civilian component or their dependents, who tender military payment certificates to unauthorized persons and that no obligation will be due to such unauthorized persons or to the Government of Japan or its agencies from the United States or any of its agencies as a result of any unauthorized use of military payment certificates within Japan.

2. In order to exercise control of military payment certificates the United States may designate certain American financial institutions to maintain and operate, under United States supervision, facilities for the use of persons authorized by the United States to use military payment certificates. Institutions authorized to maintain military banking facilities will establish and maintain such facilities physically separated from their Japanese commercial banking business, with personnel whose sole duty is to maintain and operate such facilities. Such facilities shall be permitted to maintain United States currency bank accounts and to perform all financial transactions in connection therewith including receipt and remission of funds to the extent provided by Article XIX, paragraph 2, of this Agreement.

ARTICLE XXI

The United States may establish and operate, within the facilities and areas in use by the United States armed forces, United States military post offices for the use of members of the United States armed forces, the civilian component, and their dependents, for the transmission of mail between United States military post offices in Japan

and between such military post offices and other United States post offices.

ARTICLE XXII

The United States may enroll and train eligible United States citizens residing in Japan, who apply for such enrollment, in the reserve organizations of the armed forces of the United States.

ARTICLE XXIII

The United States and Japan will cooperate in taking such steps as may from time to time be necessary to ensure the security of the United States armed forces, the members thereof, the civilian component, their dependents, and their property. The Government of Japan agrees to seek such legislation and to take such other action as may be necessary to ensure the adequate security and protection within its territory of installations, equipment, property, records and official information of the United States, and for the punishment of offenders under the applicable laws of Japan.

ARTICLE XXIV

1. It is agreed that the United States will bear for the duration of this Agreement without cost to Japan all expenditures incident to the maintenance of the United States armed forces in Japan except those to be borne by Japan as provided in paragraph 2.

2. It is agreed that Japan will furnish for the duration of this Agreement without cost to the United States and make compensation where appropriate to the owners and suppliers thereof all facilities and areas and rights of way, including facilities and areas [19] jointly used

such as those at airfields and ports, as provided in Articles II and III.

3. It is agreed that arrangements will be effected between the Governments of the United States and Japan for accounting applicable to financial transactions arising out of this Agreement.

ARTICLE XXV

1. A Joint Committee shall be established as the means for consultation between the Government of the United States and the Government of Japan on all matters requiring mutual consultation regarding the implementation of this Agreement. In particular, the Joint Committee shall serve as the means for consultation in determining the facilities and areas in Japan which are required for the use of the United States in carrying out the purposes of the Treaty of Mutual Cooperation and Security.

2. The Joint Committee shall be composed of a representative of the Government of the United States and a representative of the Government of Japan, each of whom shall have one or more deputies and a staff. The Joint Committee shall determine its own procedures, and arrange for such auxiliary organs and administrative services as may be required. The Joint Committee shall be so organized that it may meet immediately at any time at the request of the representative of either the Government of the United States or the Government of Japan.

3. If the Joint Committee is unable to resolve any matter, it shall refer that matter to the respective Governments for further consideration through appropriate channels.

ARTICLE XXVI

1. This Agreement shall be approved by the United States and Japan in accordance with their legal procedures, and notes indicating such approval shall be exchanged.

2. After the procedure set forth in the preceding paragraph has been followed, this Agreement will enter into force on the date of coming into force of the Treaty of Mutual Cooperation and Security, at which time the Administrative Agreement under Article III of the Security Treaty between the United States of America and Japan, signed at Tokyo on February 18, 1952, as amended, shall expire.

3. The Government of each Party to this Agreement undertakes to seek from its legislature necessary budgetary and legislative action with respect to provisions of this Agreement which require such action for their execution.

ARTICLE XXVII

Either Government may at any time request the revision of any Article of this Agreement, in which case the two Governments shall enter into negotiation through appropriate channels.

ARTICLE XXVIII

This Agreement, and agreed revisions thereof, shall remain in force while the Treaty of Mutual Cooperation and Security remains in force unless earlier terminated by agreement between the two Governments.

In witness whereof the undersigned Plenipotentiaries have signed this Agreement.

Done at Washington, in duplicate, in the English and Japanese language, both texts equally authentic, this 19th day of January, 1960.

FOR THE UNITED STATES OF AMERICA:

Christian A. Herter
Douglas MacArthur II

FOR JAPAN:

Nobusuke Kishi
Aiichiro Fujiyama

[20] AGREED MINUTES TO THE AGREEMENT UNDER ARTICLE VI OF THE TREATY OF MUTUAL COOPERATION AND SECURITY BETWEEN JAPAN AND THE UNITED STATES OF AMERICA, REGARDING FACILITIES AND AREAS AND THE STATUS OF UNITED STATES ARMED FORCES IN JAPAN

The Plenipotentiaries of Japan and the United States of America wish to record the following understanding which they have reached during the negotiations for the Agreement under Article VI of the Treaty of Mutual Cooperation and Security between Japan and the United States of America, Regarding Facilities and Areas and the Status of United States Armed Forces in Japan, signed today:

ARTICLE III

The measures that may be taken by the United States under paragraph 1 shall, to the extent necessary to accomplish the purpose of this Agreement, include, *inter alia*, the following:

1. To construct (including dredging and filling), operate, maintain, utilize, occupy, garrison and control the facilities and areas;

2. To remove buildings or structures, make alterations, attach fixtures, or erect additions thereto and to construct any additional buildings or structures together with auxiliary facilities;

3. To improve and deepen the harbors, channels, entrances and anchorages, and to construct or maintain necessary roads and bridges affording access to such facilities and areas;

4. To control (including measures to prohibit) in so far as may be required by military necessity for the efficient operation and safety of the facilities and areas, anchorages, moorings, landings, takeoffs and operation of ships and waterborne craft, aircraft and other vehicles on water, in the air or on land comprising, or in the vicinity of, the facilities and areas;

5. To construct on rights of way utilized by the United States such wire and radio communications facilities, including submarine and subterranean cables, pipe lines and spur tracks from railroads, as may be required for military purposes; and

6. To construct, install, maintain and employ in any facility or area any type of installation, weapon, substance, device, vessel or vehicle on or under the ground, in the air or on or under the water that may be requisite or appropriate, including meteorological systems, aerial and water navigation lights, radio and radar apparatus and electronic devices.

ARTICLE V

1. "United States and foreign vessels—operated by, for, or under the control of the United States for official purposes" mean United States public vessels and chartered vessels (bare boat charter, voyage charter and time charter). Space charter is not included. Commercial cargo and private passengers are carried by them only in exceptional cases.

2. The Japanese ports mentioned herein will ordinarily mean "open ports".

3. The exemption from making "appropriate notification" will be applicable only to exceptional cases where

such is required for [21] security of the United States armed forces or similar reasons.

4. The laws and regulations of Japan will be applicable except as specifically provided otherwise in this Article.

ARTICLE VII

The problem of telecommunications rates applicable to the United States armed forces will continue to be studied (by the Joint Committee) in the light of, *inter alia*, the statements concerning Article VII recorded in the official minutes of the Tenth (meeting of the) Joint Meeting for the Negotiation of the Administrative Agreement signed on February 28, 1952, which are hereby incorporated by reference.

ARTICLE IX

The Government of Japan will be notified at regular intervals, in accordance with procedures to be agreed between the two Governments, of numbers and categories of persons entering and departing.

ARTICLE XI

1. The quantity of goods imported under paragraph 2 by the organizations provided for in Article XV for the use of the members of the United States armed forces, the civilian component, and their dependents shall be limited to the extent reasonably required for such use.

2. Paragraph 3(a) does not require concurrent shipment of goods with travel of owner nor does it require single loading or shipment.

3. The term "military cargo" as used in paragraph 5(c) is not confined to arms and equipment but refers to all cargo shipped to the United States armed forces on a United States Government bill of lading, the term "military cargo" being used to distinguish cargo shipped to the United States armed forces from cargo shipped to other agencies of the United States Government.

4. The United States armed forces will take every practicable measure to ensure that goods will not be imported into Japan by or for the members of the United States armed forces, the civilian component, or their dependents, the entry of which would be in violation of Japanese customs laws and regulations. The United States armed forces will promptly notify the Japanese customs authorities whenever the entry of such goods is discovered.

5. The Japanese customs authorities may, if they consider that there has been an abuse or infringement in connection with the entry of goods under Article XI, take up the matter with the appropriate authorities of the United States armed forces.

6. The words "The United States armed forces shall render all assistance within their power etc." in paragraph 9(b) and (c) refer to reasonable and practicable measures by the United States armed forces.

ARTICLE XII

1. The United States armed forces will furnish the Japanese authorities with appropriate information as far in advance as practicable on anticipated major changes in their procurement program in Japan.

2. The problem of a satisfactory settlement of difficulties with respect to procurement contracts arising out of differences between Japanese and United States eco-

nomic laws and business practices will be studied by the Joint Committee or other appropriate persons.

3. The procedures for securing exemptions from taxation on purchases of goods for ultimate use by the United States armed forces will be as follows:

(a) Upon appropriate certification by the United States armed forces that materials, supplies and equipment consigned to or destined for such forces, are to be used, or wholly or partially used up, under the supervision of such forces, exclusively in the execution of contracts for the construction, maintenance or operation of the facilities and areas referred to in Article II or for the support of the forces therein or are ultimately to be incorporated into articles or facilities [22] used by such forces, an authorized representative of such forces shall take delivery of such materials, supplies and equipment directly from manufacturers thereof. In such circumstances the collection of commodity and gasoline taxes shall be held in abeyance.

(b) The receipt of such materials, supplies and equipment in the facilities and areas shall be confirmed by an authorized officer of the United States armed forces to the Japanese authorities.

(c) Collection of commodity and gasoline taxes shall be held in abeyance until

(1) The United States armed forces confirm and certify the quantity or degree of consumption of the above referred to materials, supplies and equipment, or

(2) The United States armed forces confirm and certify the amount of the above referred to materials, supplies, and equip-

ment which have been incorporated into articles or facilities used by United States armed forces.

(d) Materials, supplies, and equipment certified under c(1) or (2) shall be exempt from commodity and gasoline taxes insofar as the price thereof is paid out of United States Government appropriations or out of funds contributed by the Japanese Government for disbursement by the United States.

4. The Government of the United States shall ensure that the Government of Japan is reimbursed for costs incurred under relevant contracts between appropriate authorities of the Government of Japan and the organizations provided for in Article XV in connection with the employment of workers to be provided for such organizations.

5. It is understood that the term "the legislation of Japan" mentioned in paragraph 5, Article XII includes decisions of the courts and the Labor Relations Commissions of Japan, subject to the provisions of paragraph 6, (and 7,) Article XII.

6. It is understood that the provisions of Article XII, paragraph 6 shall apply only to discharges for security reasons including disturbing the maintenance of military discipline within the facilities and areas used by the United States armed forces.

7. It is understood that the organizations referred to in Article XV will be subject to the procedures of paragraph 6 on the basis of mutual agreement between the appropriate authorities.

ARTICLE XIII

With respect to Article XIII paragraph 2 and Article XIV paragraph 7, income payable in Japan as a result of service with or employment by the United States armed forces or by the organizations provided for in Article XV, or under contract made in the United States with the United States Government, shall not be treated or considered as income derived from Japanese sources.

ARTICLE XV

The facilities referred to in paragraph 1 may be used by other officers and personnel of the United States Government ordinarily accorded such privileges abroad.

ARTICLE XVII

Re paragraph 1(a) and paragraph 2(a)

The scope of persons subject to the military laws of the United States shall be communicated, through the Joint Committee, to the Government of Japan by the Government of the United States.

Re paragraph 2(c)

Both Governments shall inform each other of the details of all the security offenses mentioned in this subparagraph and the provisions governing such offenses in the existing laws of their respective countries.

Re paragraph 3(a)(ii):

Where a member of the United States armed forces or the civilian component is charged with an offense, a certificate issued by or on behalf of his commanding officer stating that the alleged offense, if committed by him, arose

out of an act or omission [23] done in the performance of official duty, shall, in any judicial proceedings, be sufficient evidence of the fact unless the contrary is proved.

The above statement shall not be interpreted to prejudice in any way Article 318 of the Japanese Code of Criminal Procedure.

Re paragraph 3(c):

1. Mutual procedures relating to waivers of the primary right to exercise jurisdiction shall be determined by the Joint Committee.

2. Trials of cases in which the Japanese authorities have waived the primary right to exercise jurisdiction, and trials of cases involving offenses described in paragraph 3(a) (ii) committed against the State or nationals of Japan shall be held promptly in Japan within a reasonable distance from the places where the offenses are alleged to have taken place unless other arrangements are mutually agreed upon. Representatives of the Japanese authorities may be present at such trials.

Re paragraph 4:

Dual nationals, United States and Japanese, who are subject to the military law of the United States and are brought to Japan by the United States shall not be considered as nationals of Japan, but shall be considered as United States nationals for the purposes of this paragraph.

Re paragraph 5:

1. In case the Japanese authorities have arrested an offender who is a member of the United States armed forces, the civilian component, or a dependent subject to

the military law of the United States with respect to a case over which Japan has the primary right to exercise jurisdiction, the Japanese authorities will, unless they deem that there is adequate cause and necessity to retain such offender, release him to the custody of the United States military authorities provided that he shall, on request, be made available to the Japanese authorities, if such be the condition of his release. The United States authorities shall, on request, transfer his custody to the Japanese authorities at the time he is indicated by the latter.

2. The United States military authorities shall promptly notify the Japanese authorities of the arrest of any member of the United States armed forces, the civilian component or a dependent in any case in which Japan has the primary right to exercise jurisdiction.

Re paragraph 9:

1. The rights enumerated in items (a) through (e) of this paragraph are guaranteed to all persons on trial in Japanese courts by the provisions of the Japanese Constitution. In addition to these rights, a member of the United States armed forces, the civilian component or a dependent who is prosecuted under the jurisdiction of Japan shall have such other rights as are guaranteed under the laws of Japan to all persons on trial in Japanese courts. Such additional rights include the following which are guaranteed under the Japanese Constitution:

(a) He shall not be arrested or detained without being at once informed of the charge against him or without the immediate privilege of counsel; nor shall he be detained without adequate cause; and upon demand of any person such cause must be immediately shown in open court in his presence and the presence of his counsel;

(b) He shall enjoy the right to a public trial by an impartial tribunal;

(c) He shall not be compelled to testify against himself;

(d) He shall be permitted full opportunity to examine all witnesses;

(e) No cruel punishments shall be imposed upon him.

2. The United States authorities shall have the right upon request to have access at any time to members of the United States armed forces, the civilian component, or their dependents who are confined or detained under Japanese authority.

3. Nothing in the provisions of paragraph 9(g) concerning the presence of a [24] representative of the United States Government at the trial of a member of the United States armed forces, the civilian component or a dependent prosecuted under the jurisdiction of Japan, shall be so construed as to prejudice the provisions of the Japanese Constitution with respect to public trials.

Re paragraphs 10(a) and 10(b)

1. The United States military authorities will normally make all arrests within facilities and areas in use by and guarded under the authority of the United States armed forces. This shall not preclude the Japanese authorities from making arrests within facilities and areas in cases where the competent authorities of the United States armed forces have given consent, or in cases of pursuit of a flagrant offender who has committed a serious crime.

Where persons whose arrest is desired by the Japanese authorities and who are not subject to the jurisdiction of the United States armed forces are within facilities and areas in use by the United States armed forces, the United States military authorities will undertake, upon request, to arrest such persons. All persons arrested by the United States military authorities, who are not subject to the jurisdiction of the United States armed forces, shall immediately be turned over to the Japanese authorities.

The United States military authorities may, under due process of law, arrest in the vicinity of a facility or area any person in the commission or attempted commission of an offense against the security of that facility or area. Any such person not subject to the jurisdiction of the United States armed forces shall immediately be turned over to the Japanese authorities.

2. The Japanese authorities will normally not exercise the right of search, seizure, or inspection with respect to any persons or property within facilities and areas in use by and guarded under the authority of the United States armed forces or with respect to property of the United States armed forces wherever situated, except in cases where the competent authorities of the United States armed forces consent to such search, seizure, or inspection by the Japanese authorities of such persons or property.

Where search, seizure, or inspection with respect to persons or property within facilities and areas in use by the United States armed forces or with respect to property of the United States armed forces in Japan is desired by the Japanese authorities, the United States military authorities will undertake, upon request, to make such search, seizure, or inspection. In the event of judgment concerning such property, except property owned or util-

ized by the United States Government or its instrumentalities, the United States will turn over such property to the Japanese authorities for disposition in accordance with the judgment.

ARTICLE XIX

Payment in Japan by the United States armed forces and by those organizations provided in Article XV to persons other than members of the United States armed forces, civilian component, their dependents and those persons referred to in Article XIV shall be effected in accordance with the Japanese Foreign Exchange Control Law and regulations. In these transactions the basic rate of exchange shall be used.

ARTICLE XXI

United States military post offices may be used by other officers and personnel of the United States Government ordinarily accorded such privileges abroad.

ARTICLE XXIV

It is understood that nothing in this Agreement shall prevent the United States from utilizing, for the defrayment of expenses which are to be borne by the United States under this Agreement, dollar or yen funds lawfully acquired by the United States.

Washington, January 19, 1960 (Initials)
(Initials)

[25] EXCHANGE OF NOTES INCORPORATING AGREED CONSULTATION FORMULA

(Japanese Note)

Excellency:

I have the honour to refer to the Treaty of Mutual Cooperation and Security between Japan and the United States of America signed today, and to inform Your Excellency that the following is the understanding of the Government of Japan concerning the implementation of Article VI thereof:

> Major changes in the deployment into Japan of United States armed forces, major changes in their equipment, and the use of facilities and areas in Japan as bases for military combat operations to be undertaken from Japan other than those conducted under Article V of the said Treaty, shall be the subjects of prior consultation with the Government of Japan.

I should be appreciative if Your Excellency would confirm on behalf of your Government that this is also the understanding of the Government of the United States of America.

I avail myself of this opportunity to renew to Your Excellency the assurance of my highest consideration.

(U. S. Reply)

Excellency:

I have the honor to acknowledge the receipt of Your Excellency's Note of today's date, which reads as follows:

(Text of Note)

I have the honor to confirm on behalf of my Government that the foregoing is also the understanding of the Government of the United States of America.

Accept, Excellency, the renewed assurances of my highest consideration.

Washington, January 19, 1960.

[26] EXCHANGE OF NOTES PROVIDING FOR CONTINUANCES IN EFFECT OF ACHESON-YOSHIDA EXCHANGE OF NOTES

(U. S. Note)

Excellency:

I have the honor to refer to the Security Treaty between the United States of America and Japan signed at the city of San Francisco on September 8, 1951, the exchange of notes effected on the same date between Mr. Shigeru Yoshida, Prime Minister of Japan, and Mr. Dean Acheson, Secretary of State of the United States of America and the Agreement Regarding the Status of the United Nations Forces in Japan signed at Tokyo on February 19, 1954, as well as the Treaty of Mutual Cooperation and Security between the United States of America and Japan signed today. It is the understanding of my Government that:

1. The above-mentioned exchange of notes will continue to be in force so long as the Agreement Regarding the Status of the United Nations Forces in Japan remains in force.

2. The expression "those facilities and areas the use of which is provided to the United States of America under the Security Treaty between Japan and the United States of America" in Article V, paragraph 2 of the above-mentioned Agreement is understood to mean the facilities and the areas the use of which is granted to the United States of America under the Treaty of Mutual Cooperation and Security.

3. The use of the facilities and areas by the United States armed forces under the Unified Command of the

United Nations established pursuant to the Security Council Resolution of July 7, 1950, and their status in Japan are governed by arrangements made pursuant to the Treaty of Mutual Cooperation and Security.

I should be grateful if Your Excellency could confirm on behalf of your Government that the understanding of my Government stated in the foregoing numbered paragraphs is also the understanding of your Government and that this understanding shall enter into operation on the date of the entry into force of the Treaty of Mutual Cooperation and Security signed at Washington, January 19, 1960.

Accept, Excellency, the renewed assurances of my highest consideration.

(Japanese Reply)

Excellency:

I have the honour to acknowledge the receipt of Your Excellency's Note of today's date, which reads as follows:

(Text of U. S. Note)

I have the honour to confirm on behalf of my Government that the foregoing is also the understanding of the Government of Japan.

I avail myself of this opportunity to renew to Your Excellency the assurance of my highest consideration.

Washington, January 19, 1960.

[27] EXCHANGE OF NOTES PROVIDING FOR THE SETTLEMENT OF CERTAIN CLAIMS AGAINST THE UNITED STATES FORCES BY FORMER EMPLOYEES

(U. S. Note)

Excellency:

I have the honor to refer to paragraph 6(d) of Article XII of the Agreement under Article VI of the Treaty of Mutual Cooperation and Security between the United States of America and Japan, Regarding Facilities and Areas and the Status of United States Armed Forces in Japan, signed today. The second sentence of the said paragraph provides that "in such case the Government of the United States shall pay to the Government of Japan an amount equal to the cost of employment of the worker for a period of time to be agreed between the two Governments."

I wish to propose on behalf of the Government of the United States that the period of time mentioned above shall not exceed one year after the notification provided for in paragraph 6(b) of Article XII of the above-cited Agreement, and may be determined in the consultations under paragraph 6(c) of Article XII above on the basis of mutually agreeable criteria.

If the proposal made herein is acceptable to the Government of Japan, this Note and Your Excellency's reply to that effect shall be considered as constituting an agreement between the two Governments.

Accept, Excellency, the renewed assurances of my highest consideration.

(Japanese Reply)

Excellency:

I have the honour to acknowledge the receipt of Your Excellency's Note of today's date, which reads as follows:

(Text of U. S. Note)

I have the honour to inform Your Excellency that the Government of Japan accepts the above proposal of the Government of the United States, and to confirm that your Note and this reply are considered as constituting an agreement between the two Governments.

I avail myself of this opportunity to renew to Your Excellency the assurance of my highest consideration.

Washington, January 19, 1960.

[28] EXCHANGE OF NOTES REVISING REFERENCES TO THE SECURITY TREATY IN THE MUTUAL DEFENSE ASSISTANCE AGREEMENT

(U. S. Note)

Excellency:

I have the honor to refer to the Treaty of Mutual Cooperation and Security between the United States of America and Japan signed today. It is the understanding of the Government of the United States of America that references to the Security Treaty between the United States of America and Japan, signed at San Francisco on September 8, 1951, and to the Administrative Agreement under Article III of the Security Treaty between the United States of America and Japan, appearing in the Mutual Defense Assistance Agreement between the United States of America and Japan, signed at Tokyo on March 8, 1954, shall be considered to be references to the corresponding provisions, if any, of the Treaty of Mutual Cooperation and Security and of the Agreement under Article VI of the Treaty of Mutual Cooperation and Security between the United States of America and Japan, Regarding Facilities and Areas and the Status of United States Armed Forces in Japan.

I should be appreciative if Your Excellency would confirm on behalf of your Government that this is also the understanding of the Government of Japan and that this understanding shall enter into operation on the date of the entry into force of the Treaty of Mutual Cooperation and Security.

Accept, Excellency, the renewed assurances of my highest consideration.

(Japanese Reply)

Excellency:

I have the honour to acknowledge the receipt of Your Excellency's Note of today's date, which reads as follows:

(Text of U. S. Note)

I have further the honour to confirm on behalf of my Government that the foregoing is also the understanding of the Government of Japan.

I avail myself of this opportunity to renew to Your Excellency the assurance of my highest consideration.

Washington, January 19, 1960.

[29] EXCHANGE OF NOTES RE ESTABLISHMENT OF THE SECURITY CONSULTATIVE COMMITTEE

(Japanese Note)

Dear Secretary Herter:

I wish to refer to the Treaty of Mutual Cooperation and Security between Japan and the United States of America signed today. Under Article IV of the Treaty, the two Governments will consult together from time to time regarding the implementation of the Treaty, and, at the request of either Government, whenever the security of Japan or international peace and security in the Far East is threatened. The exchange of notes under Article VI of the Treaty specifies certain matters as the subjects of prior consultation with the Government of Japan.

Such consultations will be carried on between the two Governments through appropriate channels. At the same time, however, I feel that the establishment of a special committee which could as appropriately be used for these consultations between the Governments would prove very useful. This committee, which would meet whenever requested by either side, could also consider any matters underlying and related to security affairs which would serve to promote understanding between the two Governments and contribute to the strengthening of cooperative relations between the two countries in the field of security.

Under this proposal the present "Japanese-American Committee on Security" established by the Governments of the United States and Japan on August 6, 1957, would be replaced by this new committee which might be called "The Security Consultative Committee". I would also recommend that the membership of this new committee be

the same as the membership of the "Japanese-American Committee on Security", namely on the Japanese side, the Minister for Foreign Affairs, who will preside on the Japanese side, and the Director General of the Defense Agency, and on the United States side, the United States Ambassador to Japan, who will serve as chairman on the United States side, and the Commander-in-Chief, Pacific, who will be the Ambassador's principal advisor on military and defense matters. The Commander, United States Forces, Japan, will serve as alternate for the Commander-in-Chief, Pacific.

I would appreciate very much your views on this matter.

Yours sincerely,

(U. S. Reply)

Dear Mr. Prime Minister:

The receipt is acknowledged on your note of today's date suggesting the establishment of "The Security Consultative Committee". I fully agree to your proposal and share your view that such a committee can contribute to strengthening the cooperative relations between the two countries in the field of security. I also agree to your proposal regarding the membership of this committee.

Most sincerely,

• • •

Washington, January 19, 1960.

Supreme Court, U.S.
FILED
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ALEXANDER L. STEVAS,
CLERK

No. 82-473

In the Supreme Court of the United States

OCTOBER TERM, 1982

RICHARD G. SYMANOWICZ, PETITIONER

v.

ARMY AND AIR FORCE EXCHANGE SERVICE, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

MEMORANDUM FOR THE FEDERAL RESPONDENTS IN OPPOSITION

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MEMORANDUM FOR THE FEDERAL RESPONDENTS IN OPPOSITION

Petitioner contends that the Agreement adopted pursuant to the Treaty of Mutual Cooperation and Security, Jan. 19, 1960, United States-Japan, art. VI, 11 U.S.T. 1652 *et seq.*, T.I.A.S. No. 4510, requires that he be awarded benefits under the Longshoremen's and Harbor Workers' Compensation Act (LHWCA), 33 U.S.C. (& Supp. IV) 901 *et seq.*, as extended by the Nonappropriated Fund Instrumentalities Act, 5 U.S.C. 8171-8173.[1]

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[1]Under 5 U.S.C. 8171(a), the LHWCA extends to "an employee of a nonappropriated fund instrumentality described by [5 U.S.C. 2105(c)] who is * * * a United States citizen * * * employed outside the continental United States." Respondent Army and Air Force Exchange Service is a nonappropriated fund instrumentality within the meaning of Section 2105(c).

1. Petitioner, an American citizen, was employed in Japan by Kei Motor Company (Pet. App. A2). In December 1970, he was injured in an automobile accident while en route from Misawa to Fuchu in Japan (*ibid.*). At the time of the accident, petitioner was transporting four snow tires at the request and for the benefit of the Army and Air Force Exchange Service. The Exchange requested petitioner to deliver the tires, since he was already planning to return to Fuchu from Misawa on that day (*id.* at A2-A3). Kei had a business relationship with the Exchange, unrelated to the delivery of tires, and the request was prompted by that relationship (*id.* at A8). Petitioner and his employer were not promised and did not receive any payment for transporting the tires (*ibid.*).

2. After the injury, petitioner filed a claim for compensation against the Exchange pursuant to the LHWCA, asserting that he was an Exchange employee at the time of the accident. An administrative law judge (Pet. App. A21-A35) and the Benefits Review Board (*id.* at A12-A20) denied the claim, concluding that petitioner was not an Exchange employee, but was a volunteer assisting the Exchange in furtherance of his own or his employer's interests.

On appeal, the court of appeals affirmed, upholding the finding that petitioner was "a gratuitous worker, a volunteer" for the Exchange (Pet. App. A8; 672 F.2d 638, 642).[2] The court of appeals did not discuss any issue relating to the Treaty between the United States and Japan.

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[2]In the court of appeals, the Director, Office of Workers' Compensation Programs, unsuccessfully argued that the administrative law judge and Benefits Review Board employed the wrong test to deny petitioner's status as an Exchange employee. This issue is not presented by petitioner here.

3. The sole question presented by petitioner (Pet. 6-9) is whether art. XVIII(5) of the Agreement under art. VI of the Treaty of Mutual Cooperation and Security, *supra*, 11 U.S.T. 1668, dictates a result different from that reached by the court of appeals.[3] Petitioner asserts (Pet. 8) that the Treaty mandates that claims such as his be determined pursuant to Japanese law, and argues (*ibid.*) that Japanese proceedings have conclusively determined that he was working for the Exchange. Neither claim has merit.

To begin with, petitioner is incorrect that art. XVIII(5) of the Agreement has anything to do with this case. First, the provision by its terms requires the United States employee or other individual for whom the United States armed forces are responsible to cause damage in Japan to a third party. In this case petitioner injured only himself. Second, the Treaty obviously was intended to cover certain claims against the United States by persons who were not members of the armed forces, rather than purely intra-military disputes. Petitioner's assertion, however, is that he was an employee of the Exchange at the time of the accident. Hence, the Treaty is wholly irrelevant to petitioner's claim.

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[3]Article XVIII(5) of the Agreement adopted pursuant to the Treaty, *supra*, 11 U.S.T. 1668, provides in pertinent part (Pet. App. A72):

> Claims * * * arising out of acts or omissions of members or employees of the United States armed forces done in the performance of official duty, or out of any other act, omission or occurrence for which the United States armed forces are legally responsible and causing damage in Japan to third parties, other than the Government of Japan, shall be dealt with by Japan in accordance with the following provisions:
>
> (a) Claims shall be filed, considered and settled or adjudicated in accordance with the laws and regulations of Japan with respect to claims arising from the activities of its Self-Defense Forces.

Moreover, petitioner's contention that proceedings in Japan established that he was an Exchange employee is without any support in the record.[4] The petition fails to identify any Japanese law or adjudication which would mandate, or even suggest, that his LHWCA claim should be granted. Petitioner erroneously cites a decision by the Armed Services Board of Contract Appeals as support for his assertion that "[u]nder Japanese law Petitioner was found to be a worker (i.e. employee) of the U.S. Exchange" (Pet. 4-5 & n.3) (footnotes omitted). The decision of the Board is, if anything, directly contrary to petitioner's claim here.

The Board, in reviewing a government contract dispute that included a claim by Kei Motors for compensation from the Exchange for transporting the four snow tires, ruled that Kei was entitled to no compensation because it rendered the service to the Exchange "as a matter of personal and business accommodation, * * * a voluntary favor." *Kei Jidosha Hanbai K.K.*, 73-1 B.C.A. (CCH) § 9982, at 46,856 (1973). The Board also found that petitioner must have been an employee of Kei (and not the Exchange) at the time of the accident, because Kei had collected workers' compensation on petitioner's behalf. *Id.* at 46,853, 46,858. Accordingly, the Treaty casts no doubt on the court of appeals' conclusion that petitioner was not employed by the Exchange so as to be covered by the LHWCA.

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[4]We are unaware of any record basis for petitioner's statement (Pet. 4) that "[a]dministrative proceedings in Japan, held by the Tachikawa Compensation Bureau pursuant to Japanese law, found that Petitioner could not collect workers' compensation from Japan because he was not performing work for Kei Motor Company." But even if a Japanese Bureau did so find, nothing in the Treaty relied upon by petitioner precludes the Department of Labor from making its own determination of the LHWCA coverage question.

It is therefore respectfully submitted that the petition for a writ of certiorari should be denied.

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NOVEMBER 1982

DOJ-1982-11